THE

LAW OF NATIONS

AFFECTING COMMERCE DURING WAR:

WITH A REVIEW

OF THE

JURISDICTION, PRACTICE AND PROCEEDINGS

OF

PRIZE COURTS.

BY

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NEW YORK:
JOHN S. VOORHIES. LAW BOOKSELLER AND PUBLISHER,
NO. 20 NASSAU STREET.
1863.

C. A. ALVORD, STEREOTYPER AND PRINTER.

INTRODUCTORY CORRESPONDENCE.

United States Court,
New York, *June* 3, 1861.

F. H. Upton, Esq.:

Dear Sir:—It seems certain that the unfortunate civil conflict in which our country is engaged, will call into exercise to no inconsiderable extent the prize jurisdiction of our Courts of Admiralty. If this be so, a work which shall include a summary of the Practice and Proceedings in Prize Courts, will be of great value to the profession and to suitors before the Prize Courts of the country. Knowing the interest which you have heretofore taken in the study of this subject, and your past experience in the practice in prize causes, we suggest to you, if you may control your time for such purpose, that you undertake the preparation of such a work as shall supply, in this respect, the urgent want of the profession and of the community.

Yours, respectfully,

Sam. R. Betts,
Judge of the Dist. Court of the United States.

Henry H. Elliott,
E. H. Owen,
Prize Commissioners.

To the Honorable Samuel R. Betts, Judge of the District Court of the United States, and E. H. Owen and Henry H. Elliott, Esqs., Prize Commissioners.

The suggestion, formally communicated to me in your note of the 3d of June last, was informally made by one of you, in a conversation had directly after the organization of the Federal Court for the exercise of its prize jurisdiction.

Pursuant to that suggestion, it was my original purpose to limit my labors to the endeavor to supply what seemed to be an urgent necessity, namely: a review of the origin and character of the jurisdiction of Prize Courts, and of the Practice and Proceedings

adopted by them, in the administration of the international law of maritime warfare.

In the progress of my labors to this end, I became persuaded that a preliminary review of the law of nations, so far as they relate to the interests of commerce in time of war, was essential to the just appreciation of the peculiar jurisdiction and practice of prize tribunals.

It is now nearly a half century since there has existed, in our country, any immediate practical necessity of a familiarity with the principles and rules of this law. It is, therefore, not surprising, that in the recent discussions, resulting from the present emergency, upon the interesting subjects of lawful belligerents and their rights, of the rights and obligations of neutrals, of the law of blockade, of contraband traffic, and of other kindred topics, vague and imperfect notions should be found to be prevalent.

In view of this, I hope that you may justify a departure from my first intention, although it has occasioned some delay in a compliance with your suggestion.

In the review of the important questions of international law, contained in the preliminary chapters of the work which I now present to you, no attempt at originality has been ventured, other than that involved in the arrangement and method of presenting the subjects—and as to that portion of the work which treats of the jurisdiction, practice and proceedings of prize courts—it is, and could be, little else than a methodized arrangement of the rich materials already furnished from the abundant stores of Lord Stowell and Mr. Justice Story.

Thus methodized and arranged, these subjects are now, for the first time, connected in one treatise. I sincerely trust that the result, while meeting your approval, may prove to be, not of mere temporary interest, to cease with the termination of the civil discord which has prompted it, but of substantial and permanent utility—as well to the statesmen and merchant as the lawyer.

Yours, respectfully,

F. H. Upton.

New York, *July*, 1861.

PREFACE TO THE SECOND EDITION.

It was fortunate for the wellbeing of the United States, when the standard of rebellion was raised to overthrow the government, that the direction and management of its naval affairs should have been committed to the present distinguished head of that department.

Under the judicious guidance, incomparable energy, and rare administrative capacity, which he has brought to the service, the world has witnessed with admiring wonder, the amazing change which a few brief months have wrought in the naval power of the nation.

From a condition of humiliating insignificance and inefficiency, in which he found it (induced mainly by the jealous and uniform hostility to its encouragement and increase, on the part of the slave-holding section of the Union, which, in the name of democracy, had hitherto controlled the affairs of the government), out of the great exigencies and boundless resources of the nation, it has suddenly started into life—a gigantic and invincible power—even as Minerva is said to have sprung, all armed, from the head of Jove.

Its achievements in the reduction of fortresses, hitherto deemed impregnable to the assault of naval armaments, have become memorable epochs in naval history.

Its agency in the enforcement of the government interdict of commercial intercourse with the insurgent population, over thousands of miles of coast upon the Atlantic Ocean and the Gulf of Mexico, has been not only of inestimable value to the nation, but wholly unprecedented in the annals of blockading service.

The curse of slavery, and its withering influences, being happily withdrawn from the control of the government—by God's blessing never to be restored—a complete revolution in the policy of the nation is as immediate as it was inevitable; and hereafter, the nation's navy will become and remain the great right arm of the nation's defence.

Henceforth, all subjects, in any manner connected with the management and interests of this great power, will assume an importance hitherto unacknowledged or unknown.

The numerous and important questions in the law of nations affecting the interests of neutral commerce, which have grown out of the civil war in the United States—the momentous issues discussed and

determined in the recent adjudications by the Federal courts, upon the maritime captures made by the naval forces of the government in the prosecution of the war—the many interesting subjects involved in those adjudications, connected with the practice and proceedings of courts, organized for the administration of the law of prize—and the recent congressional legislation upon matters incident to maritime warfare, have combined to render desirable, if not necessary, the new and greatly enlarged edition of this work, which is now presented to the profession and the public.

The additions, which exceed in volume the original text, are placed at the termination of the respective chapters of the first edition, which treat of subjects cognate to those of the addenda, instead of being given the awkward and inconvenient position of foot-notes, or the more undesirable form of an appendix.

The opportunity has not been neglected to correct several errors which had escaped notice in the original text, to supply a more copious and convenient index, or table of contents, for reference, and also a complete list of cited authorities.

The author desires to avail of this occasion, to express his acknowledgments for the many kind and flattering notices of his work, by the press of the country, as well as for its gracious and favorable reception in the navy and by the profession; and he ventures to indulge a hope, that his larger labors in the preparation of this edition, will be amply rewarded, by its greatly enhanced value and utility, as a text-book for future reference.

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THE LAW OF NATIONS

AFFECTING COMMERCE DURING WAR.

CHAPTER I.

Of War and its Declaration—and herein who are lawful Belligerents.

Public War is that state in which nations, authorized by the sovereign power, prosecute their rights by force.[1]

War defined.

"It is," says Lord Bacon, "one of the highest trials of right; for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms."[2]

The war-making power.

An appeal of so momentous a nature, involving the right of judging whether a nation has real and just grounds of complaint; whether she is authorized to employ force, and justifiable in taking up arms; whether prudence will admit of such a course; whether the welfare of the nation requires it, and cannot otherwise be secured—can be made only by the supreme sovereign power of the state,

[1] Grotius, De Jure, Lib. I., c. i., § 2. Albericus Gentilus, De Jure Belli, Lib. I., c. ii. Bynkershoek, Quæst. Jur. Pub., Lib. I., c. i. Vattel, Lib. III., c. i., § 1. Hobbes, De Corpore Politico, P. I., c. i., § 2.

[2] Bacon's Works, Vol. III., p. 40.

whether that exist in king, emperor, or congress, as the representative of the body of the nation.

The right to determine the question of the necessity of an appeal to force for the prosecution or recovery of a national right, for the protection of the national security by the infliction of punishment as an atonement for a national injury, or as the means of averting a threatened danger to national interests, is an inseparable incident to a salutary government. It has been called "one of the rights of majesty."[1]

The sovereign power of the state, whether the hereditary or elected representative of the people (who constitute the state), can alone be the author of war. By that order it is invoked. In that name it is conducted. By that power alone armies are enlisted, and navies are constructed and manned, and all the human agencies of warfare are but instruments in the hands and control of that power.

The war-making power.

"In order to legalize a war, it must be commenced or declared," says Lord Stowell, "by that particular branch of the state which is invested by the constitution with this important prerogative." "If," says Brooke, "all the people of England would make war with the king of Denmark, and the king (that is, our king) will not consent to it, this is not war."[2]

In the United States, the power of declaring war, as well as that of raising all the requisite means and supplies for its prosecution, by the express provisions of the constitution of the govern-

The war-making power in the U. States vested solely

[1] Hazlitt's and Roche's Manual of Maritime War, p. 2.

[2] Brooke's Abridgment, Tit. *Denizen.*

ment, is confided exclusively to the Congress of the nation."[1] in the federal Congress.

This right of majesty, this highest attribute of the sovereignty of a state, and without which it must of necessity cease to be sovereign, by the positive terms of the written constitution, ordained and established by the people of the United States, "in order to form a more perfect union" than that which had previously existed under the articles of confederation of the several states—is absolutely surrendered by the several states (which, by their people, in convention assembled, adopted and ratified that constitution) into the hands of the legislative department of the national government. Not only is this done by the provision referred to, expressly conferring the sovereign power upon the federal Congress, which would necessarily exclude the idea of its existence elsewhere,[1] but, as if to guard against the possibility of error, resulting from the hitherto prevailing sentiments in favor of the independent sovereignty of the several states, this right of majesty, this *sine qua non* of sovereignty, is declared to be shorn from the several states, by the most positive terms of the federal constitution. By section 10 of the 1st article, it is provided, that "no state shall engage in war, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state or with a foreign power," or, in fact, possess the power of doing any of those things which are essential incidents of the war-making power, such as "to grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver

The sovereign power surrendered by the several states.

[1] Const. of U. S., Art. 1, § 8.

coin a tender in payment of debts, or pass any bill of attainder," etc.

The dogma of independent state sovereignty has been adhered to with a pertinacity, which (in view of the carefully expressed and unambiguous provisions of the constitution of the United States, requires no ordinary degree of charitable forbearance to designate as honest), until at length it has brought forth its legitimate and bitter fruit, in a foolish, and wicked, and causeless rebellion of those states whose leaders have adopted it, and which can only be happily terminated by the utter extinction of this pernicious heresy.

Formal declaration considered requisite in early ages.

In the early ages of political societies, a war commenced without a solemn declaration, was considered informal and irregular, and contrary to the established usage of nations. It was so regarded down even to the time of Grotius, who, admitting that a declaration was not required by the law of nature, declares, nevertheless, that the law of nations demands it.[1] The Romans granted no triumphs for any war which was not preceded by a formal declaration. During the era of chivalry, the rules of which required the fullest notice of intention to an adversary, that he might have abundant opportunity to prepare for his defence, declarations of war were heralded and proclaimed with the greatest solemnity, and clothed with all those formalities which the habits of knighthood had carried into the customs of general warfare. With the decline of chivalry such declarations were gradually discontinued, although Clarendon, in his

[1] Grotius, De Jure, Lib. III., c. iii., § 6.

History of the Rebellion, speaks in terms of censure of the war in which the Duke of Buckingham went to France, as entered into "without so much as the formality of a declaration by the king, containing the ground and provocation and end of it, according to custom and obligation in the like cases."[1]

Puffendorff,[2] Vattel,[3] Emerigon,[4] each contend for the necessity of a public declaration before the commencement of a war, as required not only by the law of nations but by justice and humanity; and the former holds acts of hostility not preceded by a formal declaration of war, to be acts of piracy and robbery. Bynkershoek,[5] however, maintains that the law of nations does not require a declaration of war to precede the act, and cites numerous precedents to sustain his position.

No declaration required by the existing law of nations.

Such is the modern doctrine, and the well settled practice of the nations of Europe as well as of the United States.

"War," says Lord Stowell, "may lawfully exist without a declaration on either side. It is so laid down by the best writers on the law of nations."[6]

Proclamation requisite for information and guidance of citizens and neutrals.

In the war declared by the United States against Great Britain in 1812, hostilities were commenced by the United States, immediately upon the passage of the act of Congress, and without waiting to communicate any notice of intention to the English government. But although no previous declaration of intention to the adversary, be required as a justification of hostilities, yet such a declaration, by public act, proclamation, or manifesto, is essentially

[1] Claren, Hist. Reb., Vol. I., p. 40. [2] Book VII., c. vi., § 9 [3] Book III., c. iv., § 51. [4] *Traite des Assurances*, I., 563. [5] Quest Jur. Pub. Lib. I., c. ii. [6] *The Eliza Ann*, 1 Dodson, 247.

necessary for the instruction and direction of the citizen, whose individual rights are materially affected, as the direct result of a war in form. Without such a declaration, too, it would be impossible to determine, whether the rights of the citizen are impaired, as a legitimate effect of war, and for which no redress can be demanded in a treaty of peace, or whether the injuries that he has sustained are such as to demand reparation.

But not only is such a declaration requisite for the information and direction of the citizen, but it is equally necessary for the instruction of the citizens or subjects of neutral powers.

The knowledge of the existence of hostilities between belligerents, imposes upon neutrals certain duties and obligations, the strict observance of which alone entitles them to that protection in person and property, which is accorded to those who, in time of war, take no part in the contest, but remain common friends of both parties, without favoring the aims of the one to the prejudice of the other.

In the United States an act of Congress is equivalent to a a formal declaration.

By the constitution of the United States, war cannot lawfully be commenced against a foreign power, without an act of the Congress of the nation, and such an act undoubtedly operates as a formal and official notice to all the world, and is, of itself, equivalent to the most solemn and formal declaration.[1]

"When war is duly declared," says Chancellor Kent,[2] "it is not merely a war between this and the adverse government, in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the

[1] Haz. & Roch. Mar. Law, 8. [2] Kent's Com., Vol. I., p. 63.

governments of two nations is a war between all the individuals of the one, and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments, and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other."

Individual inclinations, prejudices, or partialities, must be subjected to, and controlled by, the determination of the government. The practical recognition of this principle cannot, with safety, be disregarded by the citizen.[1]

Legal commencement of hostilities.

Since the disuse of formal declarations of war, many disputes and difficulties have arisen, in the adjustment or enforcement of individual rights or obligations, from the impossibility of determining the precise date of the commencement of hostilities. Such difficulties are obviated by the constitutional provision of the United States government, which vests the war making power in the Congress alone. The date of the act of Congress, therefore, furnishes the precise period of the commencement of the peculiar duties and obligations which a condition of war imposes on the citizen.

By statute

Modern treaty stipulations between the several European nations, providing that "a rupture of pacific relations shall be regarded as having taken

[1] Lord Stowell, 1 Robinson, 118.

place at the date of recall or dismissal of the respective ambassadors," have sought to avoid the embarrassments resulting from the absence of a formal declaration.[1]

Who are lawful belligerents.

Whether any other than sovereign independent nations at war with each other, can be considered as lawful belligerents, with the rights and privileges of belligerent powers, seems not to have been made a subject of discussion by any of the elementary writers upon the law of nations.

Importance of the question in connection with the civil war in the U. States.

The question assumes no inconsiderable importance, in connection with the rebellion against the constitutional government of the United States of America, which has arisen among the people in the southern portion of the country, who, by the singular forbearance of the national government, have been enabled to seize the unprotected property of the nation, consisting of forts, arsenals, mints, custom houses, etc., erected and established among them, together with the arms, munitions of war, moneys, etc., contained therein; and having pretended to establish an independent confederacy, with all the paraphernalia of a sovereign nation, have levied armies to oppose the aroused determination of the nation to crush the insurrection, and have issued letters of marque and reprisal as a lawful belligerent, by means of which to inflict a blow upon the commerce of the country, which almost exclusively exists in that portion which remains loyal to the constitutional government.

The public documents directly relating to this

[1] De Marten's Supp., vii., 213; id. x., 870; id. xi., 471, 483, 613.

unnatural and wholly unprovoked and causeless civil conflict, including the several proclamations of the president of the United States, and of the leader of the insurrectionists, calling himself the president of the Confederate States, together with that of the sovereign of Great Britain, etc., will be found in the appendix.

Proclamation of Great Britain recognizing the Southern insurrectionists as lawful belligerents.

The language of the proclamation of the British queen, especially when considered in connection with that used, apparently with much deliberation, by the lords who speak for the British ministry, seemed to leave no doubt of the original determination of the British government to regard the persons in revolt against the constituted government of the United States as *lawful belligerents*, and to observe a strict neutrality between them and the federal government.

Effect of this by the law of nations.

The naval power of the federal government being quite sufficient to effect a complete blockade of all the ports of the rebel territory, this position on the part of Great Britain would assume a vast practical importance, inasmuch as it would open the British ports, wheresoever situated, as a shelter, asylum and protection to the privateers of the rebel community, into which they might carry their prizes and hold them in safety, to await a condemnation of a court, purporting to possess the powers of admiralty in the country of the captors.

In the carefully rehearsed colloquy upon this subject in the British Parliament, the distinguished lord by whom it was specially announced as the policy of the British government, cited as a precedent justifying the position, the recognition of Greece as a lawful belligerent, during her efforts

to become independent of Turkey, before her independence was recognized by Great Britain or any other nation.

Legislative and judicial precedents in the United States.

The learned lord (John Russell), by consulting the records of the highest judicial tribunals of the United States, and the opinions of the most distinguished jurist who has ever adorned the American bench (Chief-Justice Marshall), might have found precedents much more to his purpose, though perhaps not more susceptible of being distinguished from the case presented in the present revolt against the integrity of the United States government.

One Palmer and others were indicted in the Circuit Court of the United States in the district of Massachusetts, for an alleged robbery and piracy on the high seas. They were defended as lawful privateers, acting under the authority and commission of a lawful belligerent.

Upon a division, the question certified for the determination of the Supreme Court of the United States was as follows:—

"Whether any revolted colony, district or people, who have thrown off their allegiance to the mother country, but have never been acknowledged by the United States as a sovereign and independent nation or power, have authority to issue commissions to make captures on the high seas, of the persons, property, and vessels of the subjects of the mother country who retain their allegiance; and whether the captures made under such commissions are, as to the United States, to be deemed lawful; and whether the forcible seizing, with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects

of the mother country who retain their allegiance, on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy within the act of Congress."

Upon this question, the opinion of the Supreme Court of the United States, pronounced by Chief Justice Marshall, was clear and explicit.

"When," says he, "a civil war rages in a foreign nation, one part of which separates itself from the old established government and erects itself into a new and distinct government, the courts of the Union must view and treat the newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If that government remain neutral, but recognizes the existence of civil war, the courts of the Union cannot consider as criminal those acts of hostility which are authorized, and which the new government may direct against its enemy." "The government of the United States having recognized the existence of the civil war in question, the acts of the defendants were justified under the commission of the revolting territory, as a lawful belligerent, and were in no manner unlawful or in violation of the act of Congress."[1]

In a later case, in which the same question arose, the same court says:

"The government of the United States having recognized the existence of civil war between Spain and her colonies, our courts are bound to recognize as lawful, those acts which war authorize, and the new government in South America may direct.

[1] United States *vs.* Palmer, 4 Curtis, S. C. Decisions; 3 Wheat. 310

Captures made under their commissions must be treated by us like other captures. Their legality cannot be determined in our courts unless made in violation of our acts of neutrality."[1]

And in a still later case in the same court, in which the same question was discussed with great learning and ability by distinguished counsel, the court says: "Another objection has been urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been recognized and acknowledged as a sovereign, independent government by the executive or legislature of the United States, and therefore is not entitled to have her ships of war recognized by our courts as national ships.

"We have, in former cases, repeatedly had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality, and intercourse. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the position of neutrality. All captures made by each must be considered as having

[1] *The Divina Pastor*, 4 Curtis, S. C. Decisions, 345; 4 Wheat. 52.

the same validity; and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered as equally the right of each, and as such, must be recognized by our courts of justice until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this court, and we see no reason to depart from it."[1]

Thus it will be seen, that so far as mere precedent is concerned, *considered apart from the circumstances which induced it*, that which has been established by the government, and enforced by the judiciary of the United States, might sustain the position taken by Great Britain.

Legislative precedents of no binding authority.

But though such a precedent, of the recognition of a revolting people as lawful belligerents, were a sufficient justification of the course pursued by Great Britain toward the nation by which the precedent was established, it is not here pretended, that such, or any number of precedents, could impose an imperative law of action upon nations, or that Great Britain, under the existing circumstances, would not be entirely justified in the eyes of the civilized world, in a departure from such a precedent.

The rebellion against the government of the U. States being wholly unprecedented in all its circumstances in the history of nations, no existing prece-

The annals of the world furnish no parallel to the present atrocious combination to overthrow the constitutional government of the United States. In all those cases to which reference has been made, and indeed, in every instance recorded in history, of a people revolting against a government of which it forms a part where the revolt has assumed propor-

[1] *The Santissima Trinidad*, 5 Curtis, S. C. Decisions, 268; 7 Wheat. 283.

dent can indicate the obligation of nations to acknowledge the revolters as lawful belligents.

tions entitling it to be regarded as something other than the transient aberrations of a deluded mob, there have existed circumstances, of more or less significance, which commended the revolt to the sympathies of Christian nations.

The impartial reader of history will seek in vain for the record of such a revolt, that may not fairly be referred to some direct, pressing, urgent cause, or, at least, in which the leading spirits of the movement were not themselves in perfect accordance, in their assignment of the reasons which impelled them to resistance. But in this unnatural rebellion, against as mild, and benignant, and beneficent a government as ever existed upon earth, is presented the extraordinary spectacle of grave and apparently well-considered public documents, prepared for submission to the judgment of the world, emanating from the two prominent conspirators in the revolt—one calling himself the president, and the other the vice-president of the Confederate States—in which each sets forth elaborately what he considers the aggregation of causes which have induced the attempt to overthrow the government, so utterly discordant, so diametrically differing, each from the other, that one who should, for the first time, read the manifestos, without any previous information of current events, might suppose them to refer to different nations and a different people.

It is quite safe to declare that rebellion to be causeless, in which it is scarcely possible to find any two prominent insurrectionists agreeing in their assignment of the causes which have produced it.

It is quite safe to declare that rebellion to be causeless, that is raised against a government, which,

from its commencement, to the dawn of revolt, has been controlled and administered, in all its departments, in the interests of those by whom the rebellion has been incited. And it is quite safe to declare that rebellion to be causeless which has no other avowed basis than a pretended apprehension of a future indisposition of the government to protect the peculiar rights in the peculiar property of the revolting people—which, if successful, can have no other end than to leave those rights so utterly without all protection, that their eventual annihilation would be inevitable.

Revolting people of other nations have risen to throw off the yoke of the oppressor—to free themselves from an odious thraldom—to cast away the burdens heaped upon them by an iron despotism, and to go forth an independent people. Never before, in the world's history, was a rebellion against a constituted government resorted to with the avowed and sole purpose and object of encouraging, protecting, extending, and perpetuating human slavery, and making the perpetual bondage of a race the chief corner-stone of the social and political fabric.

Considerations such as these, might well have justified Great Britain in declaring that such recognitions of a revolted people as lawful belligerents, which have hitherto been made by nations, before their independence was acknowledged, furnish no precedent for a case like this.

CHAPTER II.

Of the Legal Obligations of Belligerents and their Allies.

War terminates commerce between belligerents.

The existence of war between nations immediately terminates all legal commercial intercourse between their citizens or subjects. This principle is of a character so obviously just, resulting from the very nature of war itself, and having its source in that natural reason and natural justice which are alike binding on the whole community of the civilized world, that all the great writers who have treated of the law of nations have assumed it as incontrovertible.[1] There is no such thing, as has been justly said, as a war for arms and a peace for commerce. The existence of war places each individual citizen of the respective belligerent nations in a condition of common hostility. By it, all treaties, all civil contracts, all rights of property, are terminated or suspended. Its existence confers the power, if it does not impose the duty, on every citizen to attack

The foundation of this doctrine.

[1] Grotius, Lib. III., c. iv., § 8; Bynkershoek, Lib. I., c. iii.; Vattel, Lib. III., c. iv.; Valin, Lib. III, Tit. 6, Art. 3.

the enemy and seize his property, though, by established custom, this right is restricted to such only, as are the commissioned instruments of the government for such purpose.

Trade and commerce presuppose the existence of civil contracts and business relations, and a recourse to judicial tribunals; and this is necessarily incompatible with a state of war.

Trade and commerce, by enriching the merchants of the enemy, and thus enabling them to contribute to the support of their government, as well as by replenishing the treasury of the enemy by the payment of export duties upon the merchandise brought from his country, operate directly to aid and assist the enemy, by furnishing him with the very sinews of war.

Besides, any individual profit or advantage which might accrue from the continuance of commercial intercourse, is far outweighed by a consideration of the public welfare, which requires a cessation of the extraordinary facilities which it affords, of conducting a traitorous correspondence with the enemy, and of conveying intelligence that the public safety demands should be withheld.

Review of judicial decisions on the subject.

A review of the English and American authorities, and the luminous and learned commentaries of Sir William Scott (Lord Stowell) and of Mr. Justice Story, illustrating the true character and extent of the principle by which all commercial intercourse is interdicted between belligerents, and of the circumstances under which it has been applied and enforced, cannot fail to be instructive, as well to the statesman and lawyer, as the merchant.

The leading English cases are, "*The Hoop*" (1

Robinson, 196) and "*Potts* vs. *Bell et als.*" (8 Term Rep. 548). In the case of "*The Hoop*," it appeared that Mr. Malcolm of Glasgow, and other merchants of Scotland, had traded with Holland, for articles necessary for the agriculture and manufactures of Scotland. They had several times applied for, and procured, the king's license for this trade during the war; but, after the passing of certain acts of Parliament, being erroneously informed by the commissioners of the customs at Glasgow, that such licenses were no longer necessary, they omitted to procure one upon the occasion in question, and, in consequence of this, the cargo being taken, was condemned as prize.

The case of "*Potts* vs. *Bell et als.*" was upon a policy of insurance effected by the plaintiff, a British subject, upon goods purchased by him from the enemy, during hostilities, and shipped from the enemy's country on board a neutral ship. The policy was held to be illegal and void.

"There exists," says Lord Stowell, "a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek, as a universal principle of the law. *Ex natura belli commercia inter hostes cessare, non est disputandum.* He proceeds to observe:

"The interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffic have been permitted, but it is, in all cases, the act and permission of the sovereign (Bynk. 6, 1 c

3). Wherever that is permitted, it is a suspension of the state of war, *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*."

"By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse would be highly expedient, but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme, and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if

necessary) under the eye and control of the government, charged with the care of the public safety?

Contracts suspended between belligerents.

Another principle of law of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally inconsistent with the relation at that time existing between the two countries, and

Courts closed against their enforcement.

that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, *a persona standi in judicis*. The peculiar law of our own country applies this principle with great rigor.

"The same principle is received in our courts of the law of nations. They are so far *British* courts that no man can sue therein, who is a subject of the enemy, unless under particular circumstances, that, *pro hac vice*, discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the king's peace, *pro hac vice*. But otherwise he is totally *ex lex*. Even in the case of ransoms, which were contracts, but contracts *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person, for the payment of the ransom bill, but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract,

nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes legal disability to contract? To such transactions it gives no sanction. They have no legal existence, and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument, in his first book, chapter 7, where he lays down, that the legality of commerce, and the natural use of courts of justice, are inseparable. He says that cases of commerce are undistinguishable from cases of any other species, in this respect. *Si hosti semel permittas actiones exercere, difficile est distinguere, ex qua causa oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

"Upon these, and similar grounds, it has been the established rule of the law of this court, confirmed by the judgment of the Supreme Court, that a trading with the enemy, except under a royal license, subjects the property to confiscation, and the most eminent persons of the law, sitting in the supreme courts, have uniformly sustained such judgments.

"In all cases of this kind which have come before this tribunal, they have received a uniform determination. The cases which I have produced, prove that the rule has been rigidly enforced where acts of Parliament have, on different occasions, been made to relax the navigation law and other revenue acts, where the government has authorized, under the sanction of an act of Parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the

Relaxation of the rule of suspension of commerce in particular cases.

same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities, and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply mutually to each other's subjects. Indeed, it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield that such is the maritime law of England."[1]

The rigid interdiction of commercial intercourse between belligerents has, in England, been carried to the extent of prohibiting the remittance of supplies to a British colony, while it was under the temporary subjection of the enemy. Grenada, a British possession, had been seized by the French, but by the public enactments, both of France and Great Britain, the island was not considered to have entirely lost its national character—for French ordinances had been made regarding it, inconsistent with its being considered a strictly French possession; and it had been enacted by the British Parliament, for the expressed purpose of giving relief to the proprietors of estates there, that no goods of

[1] Gist. *vs.* Mason, 1 T. R. 86.

the produce of Grenada, on board of neutral vessels, going to neutral ports, should be liable to condemnation as prize.

Notwithstanding these legislative declarations, that the character of Grenada was not to be regarded as strictly hostile, and notwithstanding the express permission to export the productions of the island, a neutral vessel sent from England with goods to be imported into Grenada, was seized, as engaged in unlawful intercourse with the enemy, and condemned in the vice-admiralty court of Barbadoes. The sentence of condemnation was confirmed upon appeal to the privy council.[1]

Strictness of rule by decisions of courts of the United States.

A similar strictness has been adopted, in the application of the principle, by the courts of admiralty of the United States. An American citizen had purchased goods in a British possession, prior to the commencement of hostilities between the two countries, and had deposited them on an island near the frontier. After the breaking out of hostilities, he chartered a vessel to proceed to the island and carry his merchandise to a port in the United States. On her return with the cargo, the vessel was captured, and vessel and cargo were condemned.[2]

Upon the confirmation of the judgment of condemnation, on appeal to the Supreme Court, the entire recognition of the principle of commercial non-intercourse between belligerents is thus clearly expressed.

"Whatever relaxations of the strict rights of war have been established by the more mild and miti-

[1] *The Bella Guidita*, 1 Rob., 207.

[2] *The Rapid*, 8 Cranch, 155.

gated practice of modern times, there has been none on this subject. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse between the states at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation, must acknowledge every individual of the other nation, as his own enemy, because he is the enemy of his country. It is no excuse for such trading with the enemy, that the property was purchased before the war—much less that the goods only, and not the purchase, existed before the war, in the enemy's country."

Necessity for the rigid enforcement of the rule.

In numerous other cases in the American courts the same principle has been invoked and applied with uniform strictness.[1]

In the case of *The Lord Wellington*, 2 Gallison, 103, an American vessel received a cargo from on board an enemy's ship, under the pretence of ransom. After she had discharged her cargo, and upon her return voyage, she was seized and condemned as lawful prize of war, as having been engaged in unlawful commerce with the enemy.

Penalty of violation of the rule.

In the case of *The Alexander*, 8 Cranch, 169, a ship, owned by citizens of the United States, was captured by the enemy, taken into the enemy's port, and there, upon the hearing of the libel, she was discharged, upon its being made to appear that she was sailing under an enemy's license. A cargo was then purchased and laden on board of her in the

[1] *The Lawrence*, 1 Gallison, 470; *The Alexander*, ib., 532; *The Mary*, ib., 620; *The Joseph*, ib., 540; *The Lord Wellington*, 2 ib., 103.

enemy's country, and on her voyage home she was captured. She was condemned as having been engaged in an illicit trading with the enemy.

Truce or cartel ships.

In the case of ships sent on errands of humanity in time of war, called *truce* or *cartel* ships, the rule of commercial non-intercourse is enforced with peculiar sternness. *The Venus* was a British vessel, which had gone to Marseilles, under cartel, for the exchange of prisoners. While there, a cargo was laden on board, and on her voyage thence to Port Mahon, she was stranded and captured. Upon a full view of all the circumstances of the case, judgment of condemnation was passed against her by Lord Stowell. "The conduct of ships of this description," he says, "cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent upon all parties to take care that it should be conducted in such manner as not to become a subject of jealousy and distrust between the two nations."

Again, and in another case of a like character, Lord Stowell says: "The employment to which the privilege of cartel is allowed, is of a very peculiar nature. It is a mode of intercourse between hostile nations, invented for the purpose of alleviating, in some degree, the calamities of war, by restoring to their liberty those individuals who may happen to have fallen into a state of captivity. It is the mutual exchange of prisoners of war, and therefore, properly speaking, it can have place between belligerents only." "It is not a question of gain, but one on which depends the recovery of the liberty of individuals who may happen to have become

prisoners of war; it is, therefore, a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules which have been built upon it; since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely calamitous to individuals of both countries." "Cartel ships are subject to a double obligation to both countries, not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country. Both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse. All trade must therefore be held to be prohibited, and it is not without the consent of both governments, that vessels engaged in that service can be permitted to take in any goods whatever."[1]

If a ship be really and in good faith going as a cartel, on a voyage for the purpose of bringing prisoners, she will be protected from condemnation, even although she is without a regular certificate of cartel; and this protection extends to the return voyage.[2]

While the rule of prohibition of commercial intercourse between belligerents is applied with the utmost rigor to cartel ships, yet, in the interests of humanity, their employment for the legitimate purpose of cartel is encouraged and protected.

Contracts made for their equipment and supply are considered as contracts between friends, and

[1] *The Rose in Bloom*, Dodson, 60; *The Caroline Verhage*, 6 Rob., 336.

[2] *The Diaffie*, 3 Rob., 139; *La Gloire*, 5 Rob., 192.

consequently are enforced in the judicial tribunals of either belligerent. Such vessels are regarded as licensed neutrals, and all persons connected with their navigation, in the particular service in which both belligerents have employed her, are neutral in respect of both, and under the protection of both. Persons placed on board a cartel, with their own consent, by the government of the enemy, to be carried to their own country, are bound to do no act of hostility. Therefore a capture made by such persons from the enemy, of a vessel of their own country, is not, in contemplation of law, a recapture, and confers upon them no right as salvors, nor does it restore the former owner to his title to the vessel.[1]

Rule of suspension of commercial intercourse applicable to allies as well as belligerents.

The principle which interdicts commercial intercourse between belligerents, is equally applicable to their allies.

"It is well known," says Lord Stowell, "that a declaration of hostility naturally carries with it an interdiction of commercial intercourse. It leaves the belligerent countries in a state which is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce that effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations, and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a single belligerent chooses to weaken

[1] *Crawford* vs. *The William Penn*, Peters, 106; *The Mary Folger*, 5 Rob., 00; *La Rosine*, 2 Rob., 372.

and dilute his own rights, but it is otherwise when allied nations are pursuing a common cause against a common enemy.

Between them it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it be an enemy like Holland, very materially depending on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem, therefore, that it is not enough to say that one state has allowed this practice to its own subjects; it should appear to be, at least, desirable that it could be shown, either that the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state."[1]

Attempts to evade the rule of suspension of commerce.

The allurement of brilliant profits which may result from a successful violation of the rule of prohibition of commercial intercourse between belligerents, has led to many individual attempts to evade the rule, or avoid the penalties of its infringement by various artifice; but no ingenuity has yet succeeded in discovering a mode by which a trade between belligerents can be carried on with impunity, without the authorization of the governments.

In one case, a cargo was shipped in England, destined for the market of the enemy. An attempt

[1] *The Neptune*, 6 Rob., 405.

was made to protect it by dividing the voyage, so that the cargo should be taken in the first instance to a neutral port, from which it might or might not thereafter, be carried to the place of its real destination—the port and market of the enemy.[1] Upon a capture being made, it was condemned to the captors. In his opinion in this case, Lord Stowell says: "Without the license of government, no communication, direct or indirect, can be carried on with the enemy. Where no rule of law exists, a sense or feeling of general expediency, which is, in other words, common sense, may be fairly applied; but where a rule of law interferes, these are considerations to which the court is not at liberty to advert. In all the cases that have occurred on this question, and they are many, it has been held indubitably clear, that a subject cannot trade with the enemy without the special license of the government. The interposition of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance that the goods are to go first to a neutral port, will not make it lawful; the trade is still liable to the same abuse, and to the same political danger, whatever that may be."

In another case, an attempt was made to protect property purchased in the country of the enemy, by the employment of a neutral intermediary; but upon capture, it was condemned as lawful prize, the neutral being regarded in such case, as the mere agent, the property being considered, in legal intendment, as passing directly from the enemy to the purchaser.[2]

[1] *The Jonge Pieter*, 4 Rob., 79.

[2] *The Samuel*, 4 Rob., 284; 8 Term. R., 548.

In another case, an attempt was made to elude the rule by carrying on the trade with the enemy by a firm consisting partly of neutrals and partly of belligerents, but it was held that "even an inactive or sleeping partner, as it is termed, cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader."[1]

The early decisions in the English common law courts in which the doctrine of the illegality of commercial intercourse between belligerents was involved, were not in entire conformity with the principle as established in the admiralty.[2] But a uniformity of decision was definitively determined by Lord Kenyon in a later case,[3] in which he says: "The reasons urged, and the authorities cited, are so many, and so uniform, and so conclusive, to show that a British subject's trading with an enemy is illegal, that the question may be considered finally at rest, and it is needless to delay giving judgment, for the sake of pronouncing the opinion of the court in more formal terms."

Present uniformity of law and admiralty decisions on this point.

The reasons on which the principle is established, which interdicts commercial intercourse between belligerents, make it equally applicable, whether that intercourse be conducted upon the land or by water. A note in Rolle has been cited as authority, showing that it was anciently deemed illegal for an English subject to trade with Scotland, then in a general state of enmity with England.[4] Lord Stowell, in the case of *The Hoop*, before cited, referring

Rule of suspension in commerce applicable on land as well as on water.

[1] *The Franklin*, 6 Rob., 131.

[2] *Gist* vs. *Mason*, 1 Term R., 84; *Bell* vs. *Gibson*, 1 Bos. & Pul., 245.

[3] *Potts* vs. *Bell*, 8 Term R., 548.

[4] Rolle's Ab., 173.

to the note in Rolle, says: "What the common law of England may be, it is not necessary, nor perhaps proper, for me to inquire; but it is difficult to conceive that it can, by any possibility, be otherwise, for the rule in no degree arises from the transaction being on the water, but from principles of public policy, and of public law, which are just as weighty on the one element as on the other, and of which the cases have more frequently happened upon the water, merely in consequence of the insular situation of this country."

Rigorous enforcement of the rule within its just limits.

Although the rule of prohibition of commercial intercourse between belligerents is applied by courts of admiralty in the exercise of prize jurisdiction with the utmost rigor and strictness, yet in many cases which have arisen, the disposition has been clearly manifested not to extend the rule beyond the limits required by a just consideration of the reasons and policy upon which it is founded.

Cases illustrating the manner of its enforcement.

The ship *Abby* sailed from a port in England for the island of Demerara, then a Dutch colony, on the 11th of September, 1795. War was declared with Holland on the 16th of the same month, and, of course, Demerara became, *ipso facto*, a hostile possession. The ship was captured off its coast, in May, 1796; but in the meanwhile the island had surrendered to a British force, and consequently had become a British colony.

It was held by Lord Stowell that, as the port to which the ship was destined did, at the time of her carrying the design into effect, belong, not to an enemy, but to his Britannic Majesty, the ship was not to be deemed in fact an illegal trader.[1]

[1] *The Abby*, 5 Rob., 251.

"I conceive," said he, "that there must be an act of trading to the enemy's country, as well as the intention; there must be, if I may so speak, a legal as well as a moral illegality. If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different—the accident has turned up in his favor—the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with the enemy (which I have already observed cannot be ascribed to the party at the commencement of the voyage, hostilities not having then been declared), but at the time of carrying the design into effect, the person is become not an enemy—the intention here wants the *corpus delicti*.

"No case has been produced in which the mere intention to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage toward that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle, I am of opinion that the party is free from the charge of illegal trading."

English merchants shipped on board a Spanish vessel bound from London to Corunna, a quantity of merchandise, to the order of Spanish merchants. Shortly after the shipment, and the voyage had commenced, hostilities were declared between Great Britain and Spain, and on the voyage the vessel was

seized by a British captor.[1] Lord Stowell decreed restitution of the property to the shippers, saying: "The English merchants who shipped the goods were not called upon to know that the injustice of the other party would produce a war before the goods were delivered—the goods were to have been at the risk of the shippers till delivery—and the contract was perfectly fair."

In all cases, however, in which voyages have been commenced for trade with the enemy's country before the breaking out or declaration of hostilities, it is incumbent upon the claimants whose property is captured, to show that on the first notice of hostilities, all diligence possible was employed to effect a countermand of the voyage, or to change the destination of the vessel, so as to avoid the culpability of an illegal trading with the enemy. If such exertions have not been made, and if, either through neglect or design, the goods have been allowed to leave the enemy's country, no excuse, based upon individual inconvenience, or the necessity or policy of withdrawing property out of the country of the enemy, can of strict right avail, to avert a judgment of condemnation upon a capture.

It was held in the case before cited, of *Bell* vs. *Gibson*, that if an Englishman, at the commencement of hostilities, have merchandise in an enemy's country, he might withdraw it therefrom. But, as we have seen, the later case of *Potts* vs. *Bell*, reversed that doctrine, and it was there definitively established that trading with the enemy is ground

[1] *The Packet De Bilboa*, 133.

of confiscation, and this without any exception, even upon the fact being shown that the goods were purchased before the war.

Mitigation in cases of great hardship.

In cases which present circumstances of extreme hardship, courts of admiralty, in the exercise of prize jurisdiction, have manifested a willingness to soften the asperity of the rule, in its application.

In the case of "*The Dree Gebroeders*," Lord Stowell said: "Pretences of withdrawing funds are at all times to be watched with considerable jealousy; but when the transaction appears to have been conducted *bona fide* with that view, and to be directed only to the removal of property which the accidents of war may have lodged in the belligerent's country, cases of this kind are entitled to be treated with some indulgence."[1]

In another case in which an indulgence was allowed by the court for the withdrawal of property from the enemy's country, Lord Stowell declared that his decree must be considered as in no degree relaxing the necessity of obtaining a license.[2]

In another case[3] decided by Lord Stowell, it would seem that the rigor of the rule was made to bend to the peculiar circumstances. Upon an examination of the circumstances, it will be found that although the letter of the rule may be relaxed, its spirit is not contravened.

The property in question, in that case, consisted of wines, a portion of which had been purchased in Spain, for the supply of the British fleet, before hostilites with that country. After the breaking

[1] *The Dree Gebroeders*, 4 Rob., 234.

[2] *The Juffrow Catherina*, 5 Rob., 141.

[3] *The Madonna delle Grazie*, 14 Rob., 195.

out of the war, a secret deposit was made of the wines in Spain, and from thence they were removed to Leghorn; previous to which, however, some newly purchased wines were added for mixing, in order to color the stock which had become too pale to be salable. The mixture of the new wine, purchased after the commencement of hostilities, was considered by the learned court so indispensably necessary to the disposal of the old cargo, as not to affect the legality of the transaction.

The court then proceeds to excuse the want of a license in that case, as follows:

"It is said that Mr. Gregory, the claimant in that case, might have obtained a license. I certainly do not mean to weaken the obligation to obtain licenses for every sort of communication with the enemy's country, in all cases where the measure is practicable; but I think I see great difficulties that might have occurred in applying for a license, or using it, in the present case. How could Mr. Gregory describe his wines as to the place from whence they were to be exported? They were deposited secretly, and could only be exported by particular opportunities. On the other hand, can I entertain a doubt that government would have been very desirous to protect him in the recovery of his property, purchased under a contract with them? Or, on the ground of public utility, is it too much to hold out this encouragement to persons engaged in contracts of this sort, that they shall obtain every facility in the disposing of such stores?

It would be considerable discouragement to persons in such situations, at a distance from home, and employed in the public service, if they were to

know, that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a license, inasmuch as if a license had been applied for, it must have been granted."

Commerce carried on without license, by a citizen resident in an enemy's country, even though he be a representative there of his own country, and even though such commerce be manifestly beneficial to his own country, is illegal, and the property which is the subject of it may become lawful prize.[1]

Legal effect of war on person, property, and rights of citizens.

Under this chapter, which treats of the rights and obligations and liabilities of citizens of belligerent nations and their allies, the effect which a condition of war, of itself, produces upon the person, property and rights of the citizen may be briefly considered.

The property of a nation consists of the property of the aggregation of individuals composing that nation, and therefore, a claim to indemnification for injuries sustained from a foreign state (to enforce which, is the ostensible cause of all international wars), may be satisfied by a seizure of the property of any individual members of that state. Upon this principle, the practice of nations in time of war has always proceeded. Although, as Grotius says, there is no natural responsibility of one person for the offences of another, yet by the law of nations, the "*jure gentium voluntario*," the whole property of the individual members of a state is responsi-

[1] Ex parte Baglehole, 18 Ves. Jr., 528; 1 Rose, 271.

ble for the debts or obligations of the state or sovereign.[1]

Upon this point Vattel is more emphatic. He says, that the property of individuals in the aggregate, is to be considered, with respect to other states, as the property of the nation itself. A nation, being regarded by foreign nations as constituting only one whole, one single person, all their wealth together can only be considered as the wealth of the same person.

If one nation has a right to any part of the property of another, she has an indiscriminate right to the property of the citizens of the latter nation, until the debt is paid.[2]

General right of captures, reprisals, &c.

From this principle result many important rights and liabilities, such as captures, reprisals, &c., by which the property of any citizen of an enemy's state is seized as indemnification for the injuries sustained by the state or the citizens. These will be more fully considered hereafter.

Resulting from this principle, also, it is well established, that the persons and the property of alien enemies, found within the state, when a war breaks out, may be rightfully seized by the government, the individuals as prisoners of war, and the property to indemnify the nation. The modern practice of nations has greatly mitigated the severity of the rule of right, and in some instances, it has been modified by treaty; but there is no doubt of the right, and that, in the absence of express convention, it may be lawfully exercised. By Magna

[1] Grotius De Jure, Lib. III., c. ii, § 2.

[2] Vattel, Droit des Gens, Liv. II., c. vii., §§ 81, 82.

Charta of Great Britain, it was provided that the merchants of a foreign nation, found in Great Britain, upon the breaking out of hostilities with that nation, should be detained, until it were known how British subjects were treated by the enemy, and then to be released or detained accordingly.[1]

Rule in the early ages.

In the Middle Ages, the rule was rigidly enforced, but its relaxation commenced with the advance of civilization and the growing appreciation of the importance of commerce. As early as 1483, Louis XI. granted protection to the persons and property of the Hanse Towns, with liberty to remain for one year after the war broke out.[2] In the sixteenth century it became a common stipulation in commercial treaties between nations, that the citizens or subjects of either should be allowed a specified time, varying from three months to two years, from the commencement of a war, during which they might remain unmolested for the settlement of their affairs, and retire peaceably, at any time within the period stipulated. By the treaty of 1786 between Great Britain and France, it is provided that the subjects of either power shall be allowed to continue their residence during war, in the dominions of the other, as long as they comport themselves to the satisfaction of the government.[3] An article of a similar character was inserted in the treaty of 1795 between the United States and Great Britain. By this it is provided, that the citizens of either power may remain unmolested during war in the

Treaty stipulations.

[1] Blackstone's Law Tracts, XVII.–XXXIII., LI.

[2] Dumont, III., ii., 123.

[3] De Marten's Recueil, IV., 156.

dominions of the other, as long as they "behave peaceably and commit no offence against the laws;" and in case either government thinks proper to desire their removal, twelve months' notice shall be allowed them for that purpose.[1] But, as before remarked, where there is no treaty stipulation to the contrary, the right remains. The rule so well established in Europe has been recognized by the highest federal tribunal in the United States. "However strong," says Chancellor Kent, "the current of authority, in favor of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country, and it has been definitively settled in favor of the ancient and sterner rule, by the Supreme Court of the United States. The effect of war upon British property found in the United States on land, at the commencement of the war, was learnedly discussed and thoroughly considered, in the case of "Brown;" and the Circuit Court of the United States at Boston, decided, as upon a settled rule of the law of nations, that the goods of the enemy found in the country, and all the vessels and cargoes found afloat in our ports, at the commencement of hostilities, were liable to seizure and confiscation, and the exercise of the right vested in the discretion of the sovereign of the nation. When the case was brought up, on appeal, before the Supreme Court of the United States, the broad principle was assumed, that war gave to the sovereign the right to take the persons, and confiscate the property of the enemy, wherever

Modern rule in absence of treaty stipulations.

[1] De Marten's Recueil, V., 686.

found, and that the mitigation of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself."[1]

Property exempt from the rule, public funds.

There is one description of property of the enemy which is invariably respected in time of war, and that is, the sums due from the state to the enemy, such as the property which the enemy may have in the public funds or stock. This property is justly regarded as intrusted to the faith of the nation. Its credit, honor, security, require that it should be held sacred. An attempt was made by Prussia in 1752 to apply such property for the purpose of reprisals. But it was universally held at the time as an infamous breach of public faith, without example to justify it, and not likely to furnish excuse or precedent for future action.[2]

Private debts.

But debts due from individuals to subjects or citizens of the enemy's country, stand in an entirely different position from that of debts due from the state which are under the guaranty of the national honor. Debts due from individuals to the enemy, may undoubtedly be confiscated, by the rigorous application of the rights of war, being the property of the enemy, and therefore liable to confiscation; but in modern warfare the exercise of this right has been almost universally discontinued.

"The claim of a right to confiscate debts," says Chancellor Kent, "contracted by individuals in

[1] Kent's Com., Vol. I., 59; *Brown* vs. *The United States*, 8 Cranch, 110; *Ware* vs. *Hilton*, 3 Dallas, 199.

[2] Charles De Marten's "Causes Celeb. du Droit des Gens," Vol. II.

time of peace, and which remain due to the subjects of the enemy at the declaration of war, rests very much upon the same principle as that concerning the enemy's tangible property found in the country at the opening of the war. In former times, the right to confiscate debts was admitted as a doctrine of national law, by Grotius,[1] Puffendorff,[2] Bynkershoek,[3] and Lord Hale.[4] It had the countenance of the civil law,[5] and even Cicero,[6] when stating the cases in which promises are not to be kept, mentions that of the creditor becoming the enemy of the country of the debtor. Down to the year 1737, the general opinion of jurists was in favor of the right. But Vattel[7] says that a relaxation of the rigor of the rule has since taken place among the sovereigns of Europe, and that, as the custom has been generally received, he who should act contrary to it, would violate the public faith, for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. There has been frequently a stipulation in modern treaties that debts or moneys in the public funds should not be confiscated in time of war, and these conventional provisions are evidence of the sense of the governments which are parties to them, that the right of confiscation of debts and things in action is against good policy, and ought to be discontinued. The treaties between the United States and Colombia, in 1825, and Chili, in 1832, and Venezuela in 1836, and the Peru Bolivian Con-

Private debts —Remedy suspended but debts not confiscated by the modern rule.

Treaties on the subject.

[1] Grotius B. I., c. i., § 6; B. III., c. iii., § 4.
[2] Puff. I., 8, c. vi., 19, 20. [3] Bynk. I., 1., c. vii.
[4] Lord Hale, I., 95. [5] Dig. 41, 1, 49, 15.
[6] Cic. De Off. I. 3., c. xxvi. [7] Vattel B. III., c. v., § 77.

federation in 1838, and of Ecuador in 1839, contained such a provision. But the treaty between the United States and Great Britain in 1795, went further, and contained the explicit declaration that it was "unjust and impolitic that the debts of individuals should be impaired by national differences." Vattel says, that everywhere, money lent to the public is exempt from confiscation and seizure in time of war. Emerigon[1] and Martens[2] make the same declaration. With regard to the United States, however, the cases of *Brown* vs. *The United States*, 8 Cranch, 110, and *Ware* vs. *Hilton*, 3 Dallas, 199, establish it as a principle of public law, as far as the same is understood and declared by the highest judicial authorities in that country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by its citizens and due to the enemy, though, as it is asserted by the same authority, this right is contrary to universal practice, and may therefore well be considered as a naked and impolitic right, condemned by the enlightened judgment and conscience of modern times."[3]

But the modern practice of nations in war, while departing from the ancient rule of confiscation of debts to the enemy, is uniform in suspending their payment, either by absolute prohibition, or by closing the doors of the courts against proceedings for their enforcement. Thus the debt is not annulled, but the remedy to reduce it to possession is sus-

[1] Emerigon, Des. Ass. I., 567; De Martens, B. VIII. c. ii., § 5.
[2] Kent's Com., I., 71; *The Ann Greene*, 1 Gall., 292.

pended. This doctrine was established in a leading English case, in which one Boussemaker, a bankrupt, was indebted to certain alien enemies, whose debts the commissioners refused to admit. On the return of peace, these creditors filed their petition, praying to be allowed to prove their claims, and upon the decision of the case in the Court of Chancery, the Lord Chancellor took occasion to explain the distinctions of the law and its principles on the important question whether the right of an alien enemy was destroyed, or only suspended by war. "If this," says his lordship, "had been a debt arising from a contract, entered into with an alien enemy during war, it could not possibly stand, for the contract would be void—but if the two nations were at peace at the date of the contract, though, from the time of war taking place, the creditor could not sue, yet, the contract being originally good, upon the return of peace the right would revive. It would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, there is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action.

"The policy of avoiding contracts with an enemy is sound and wise; but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost is very different."[1]

[1] Ex parte Boussemaker, 13 Ves. Jun., 71.

THE CIVIL WAR IN THE UNITED STATES;

With a Review of the Judicial Discussions and Determinations of the Rights and Liabilities Resulting Therefrom.

In this supplement to the chapter which treats of the rights and liabilities resulting from war, it is proposed to consider the grave and interesting questions connected with those rights and liabilities, which have constituted the basis of objections to the validity of the maritime captures made during the existing civil war in the United States; and to recite, at such length as the great importance of the subject may justify, the judicial discussions and determinations which have thus far been had upon these questions.

Belligerent rights exercised by the United States in the conduct of the civil war.

The government of the United States, in entering upon the performance of its momentous duty of suppressing an insurrection of its slaveholding citizens, which had assumed the character and proportions of civil war, saw fit to bring into exercise its belligerent rights, so far as they relate to the commerce and commercial intercourse of the insurgent section, carried on by means of the ports upon its coast or rivers.

These rights were asserted by the Executive institution of a blockade of these ports.

Having in view the purpose for which the blockade of the southern ports was established, namely, the cutting off the insurgents from all means of converting their movable property into warlike munitions and stores for subsistence, which would enable them to prosecute and prolong the unholy contest

upon which they had entered, the wisdom of the policy of resorting to a belligerent blockade, rather than to the sovereign right of closing the ports by municipal regulation, cannot be questioned.

The wisdom of the policy of the belligerent blockade of the insurgent ports;

A belligerent blockade addresses itself to neutral commerce throughout the world. It speaks to neutral traders in all quarters of their dispersion, prohibiting them from fitting out their vessels for a voyage to any of the invested ports, forbidding their approach to such ports under any pretence whatsoever, and holding over them the terrors of capture and its consequences, not only for the actual but the attempted offence, and not only upon the voyage on which the interdict was evaded, but at any time on the voyage following that of the offence, and not only while in the act of violation, but anywhere upon the high seas, out of neutral jurisdiction.

The closing of the ports by municipal regulation, declaring them no longer ports of entry and delivery, is a sovereign right, which can be exercised and enforced only within the territorial jurisdiction of the nation.

In preference to a municipal regulation, closing the ports as ports of entry.

Beyond the few miles from the coast, to which that jurisdiction is limited, it is wholly inoperative.

The fitting out of vessels avowedly destined to ports thus closed, is no offence. The approach to, and hovering about, such closed ports, with the avowed design of entering whenever opportunity occurs to avoid the revenue cruiser, is not a culpable act, for which any penalty can be imposed; and seizure must be made of the offending vessel before she reaches that line which marks the restricted

limits of the sovereign's jurisdiction, or it cannot be made at all.

To enforce such a regulation, all the naval forces of the world would be hopelessly inadequate. When to this is added the consideration, that proceedings for the forfeiture of property seized for an infraction of the municipal regulation, must be taken upon the instance side of the Admiralty Courts of the sovereign, and conducted without any of the summary and speedy action and determination, which may and should distinguish the courts that are organized for the enforcement of belligerent rights under the law of nations, it seems incredible, that any one can have doubted the wisdom of the policy adopted to effect the purpose of commercial interdiction, or have seriously proposed its virtual abandonment, by a resort to the municipal regulation.

Objections raised to the validity of captures for the violation of the blockade.

But, the institution of a blockade, under the law of nations, being the exercise of a purely belligerent right, presupposes the existence of war—of war which carries with it the consequences of a public war, imposing restrictions upon neutral commerce, and subjecting to confiscation, property impressed with hostility of character; and, it was urged by distinguished advocates, as a fundamental objection to the validity of captures made either for the violation of the asserted belligerent right, or as the property of public enemies, or impressed with a hostile character, that under the peculiar frame of government and written constitution of the United States, a state of war, carrying with it such consequences, could not result merely from the existence of an armed rebellion by a portion of its citizens,

whatever its organization, and however formidable its dimensions; that even under monarchical or other forms of government, without written constitutions, there is no authority for the position, that a state of war, with the incidents of public war, results from an armed insurrection, occupying portions or districts of an empire or kingdom, in the absence of any decree, edict, or act of legislation of the supreme power.

It was further argued, that if war, with its attendant consequences, did not exist as the result alone of the armed insurrection, it could not lawfully be called into existence by the mere exercise of the powers confided to the President by the Constitution of the United States, and the laws made in pursuance thereof, for the suppression of insurrection, because, by the terms of the Constitution, war can only be declared or called into existence by an act of the Congress of the nation.

It was therefore argued, that captures made prior to any legislative enactment, and which could be upheld solely under the law of nations, as affecting commerce during the existence of public war, were without warrant of law, and should be so decreed, by restitution of the captured property.

These positions were presented and illustrated with great ability and learning by the distinguished advocates, who represented the interests of neutral or rebel claimants, in the Federal courts of prize.

Judicial determination of these objections.

How they were met and answered will be best shown by liberal extracts from the opinions of the eminent judges presiding in those courts.

The case first decided was that of *The Tropic*

The case of the *Tropic Wind*. U. S. District Court for the District of Columbia.

Wind, in the District Court for the District of Columbia.

This case assumed a peculiar interest, not only because it was the first which arose under the proclamation of blockade, but because the prize was a British vessel, and it was understood that Her Britannic Majesty's representative at Washington, assumed, to some extent, the direction of the defence, in order that the grave questions involved, affecting the rights of neutral commerce, should be thoroughly and ably presented and sustained.

The vessel was captured on the 21st of May, 1861, near the mouth of James River, by the United States ship *Monticello*, for the violation of the blockade of Richmond, by egress from that port, which she had entered prior to the proclamation.

Passing over the incidental, yet interesting questions, which were raised in the case, as to notice of the blockade, the time when it became effective, the time allowed neutral vessels to depart, and the effect of taking in a cargo in a blockaded port, after notice of the blockade; in this connection it is proposed to limit quotation, to the language of the court in discussing and deciding the fundamental questions involved in the adjudication.

Upon these, the learned judge says:

Opinion of Mr. Justice Dunlop.

"The authority of the President to institute the blockade, is denied by the respondents, who insist that this power, under the Constitution of the United States, can only be exercised by the national legislature. And this is the first question to be considered.

"It is true no department of the Federal govern-

ment can exercise any power not expressly conferred on it by the Constitution of the United States, or necessary to give effect to granted powers; all others are reserved to the states respectively, or to the people. In the second article, second section of the Constitution of the United States, is this provision: 'The President shall be commander-in-chief of the army and *navy* of the United States, and of the militia of the several states, when called into the actual service of the United States.'

"In the war with Mexico, declared by Congress to *exist* by the act of Mexico (see 9 Statutes at Large, page 9), the Supreme Court have maintained, in two cases, that the President, *without any act of Congress*, as commander-in-chief of the army and navy, could exert the belligerent right of levying contributions on the enemy, to annoy and weaken him. In the case of *Fleming et al.* vs. *Page* (9 Howard, 615), the present Chief-Justice says: 'As commander-in-chief he is authorized to direct the movements of the naval and military forces, placed by law at his command, and to employ them in the *manner he* may deem most effectual to harass and conquer and subdue the enemy.' Again, at page 616: 'The person who acted in the character of collector, in this instance, acted as such, under the authority of the military commander, and in obedience to his orders, and the *duties* he exacted, and the regulations he adopted, *were not those prescribed by law*, but by the *President, in his character of commander-in-chief*. The custom-house was established in an enemy's country as *one of the weapons* of war. It was established, not for the purpose of giving the people of Tamaulipas the benefit of com-

merce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and the burdens of the war. The duties required to be paid, were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify, when an army is operating in the enemy's country.'

"The other case to which I allude is *Cross et al.* vs. *Harrison* (16 Howard, 189, 190). Judge Wayne in delivering the opinion of the Supreme Court, says: 'Indeed, from the letter of the secretary of state, and from that of the secretary of the treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a *rightful* and correct recognition under all the circumstances, and when we say rightful we mean that it was *constitutional*, although Congress had *not* passed an act to extend the collection of tonnage and import duties to the ports of California. California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all the Upper California. Early in 1847 the President, as *constitutional commander-in-chief* of the army and navy, *authorized* the military and naval commanders of our forces in California, to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to im-

pose duties on imports and tonnage as *military contributions* for the support of the government and of the army, which had the conquest in possession, &c. No one can doubt that these orders of the President, and the action of our army and navy commanders in California, in conformity with them, was according to the law of arms,' &c. (See also pages 191, 193, 195, 196, 201.)

"Blockade is a belligerent right under the law of nations where war exists, and is as clearly defined as the belligerent right to levy contributions in the enemy's country. As the Supreme Court hold the latter power to be constitutionally in the President, without an act of Congress, as commander-in-chief of the army and navy, it follows necessarily that the power of blockade also resides with him; indeed it would seem a clearer right, if possible, because, as chief of the navy nobody can doubt the right of its commander to order a fleet or a ship to capture an enemy's vessel at sea, or to bombard a fortress on shore, and it is only another mode of assault and injury to the same enemy, to shut up his harbors, and close his trade, by the same ship or fleet. The same weapons are used. The commander only varies the mode of attack.

"In the 1st article, § 8, clause 11, of the Constitution, under the legislative head, power is granted to Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' These powers are therefore solely confided to and within the control of the legislature, and cannot be exercised by the President. The President cannot declare war, grant letters of marque, &c., though all other belligerent

rights, arising out of a state of war, are vested in him as commander-in-chief of the army and navy.

"But, *war declared* by Congress, is not the only war within the contemplation of the Constitution. In clause 15, art. 1, § 8, among the legislative powers is this: 'to provide for calling forth the militia to *execute the laws* of the Union, suppress insurrections, and repel invasions,' and the legislature, in execution of this power, passed the act of 1795 (1 Statutes at Large, 424), vesting in the President, under the terms set forth in the statute, discretionary power over the militia, in the cases enumerated in the 15th clause of § 8, article 1. The *status* of foreign nations whose provinces or dependencies are in revolution, foreign invasion of our own country, and insurrection at home, are political questions, determinable by the executive branch of our government. I refer on this subject to the following cases in the Supreme Court of the United States. *The Santissima Trinidad* (7 Wheaton, 305):

"'This court has repeatedly decided that it will not undertake to determine who are sovereign states, but will leave that question to be settled by the other departments who are charged with the external affairs of the country, and the relations of peace and war. It may, however, be said, that both the judiciary and the Executive have concurred in affirming the sovereignty of the Spanish colonies now in revolt against the mother country. But the obvious answer to this objection is, that the *court*, *following* the executive department, have merely declared the notorious fact, that a civil war exists between Spain and her American provinces, and this, so far from affirming, is a denial of the sove-

reignty of the latter. It would be a *public* and not a civil war if they were sovereign states. The very object of the contest is to decide whether they shall be sovereign and independent or not; all *that the court has affirmed is* that the *existence* of this *civil war* gave to *both* parties all the *rights of war* against each other.'

"In cases of invasion by a foreign power or insurrection at home, in which cases, under the act of 1795, the President may call out the militia, the Supreme Court, in 12 Wheaton (case of *Martin* vs. *Mott*), pages 29, 30, says it is exclusively with the President to decide whether the exigencies provided for have arisen. These also are political questions, determinable by the Executive alone, and the courts follow that branch of the government. In this case, at page 32, the Supreme Court says: 'It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself.'

"Whether insurrection has grown to such a *head*, has become so formidable in power, as to have culminated in civil war, it seems to me must also belong, as to its decision, to the same political branch of the government. The President, in his proclamation relating to the blockade of the ports of the Confederate States, calling out seventy-five thousand militia to suppress insurrection, and the resistance to the Federal laws, alleges 'that nine states have so resisted,' and have 'threatened to issue letters of marque to authorize the bearers thereof to commit assaults against the vessels, property, and lives

of citizens engaged in commerce on the high seas and in the waters of the United States; that public property of the United States has been seized, the collection of the revenue obstructed, and duly commissioned officers of the United States, while engaged in executing the orders of their superiors, have been arrested and held in custody as prisoners, or have been impeded in the discharge of their official duties, without due legal process, by persons claiming to act under authorities of the states of Virginia and North Carolina, an efficient blockade of the ports of those states will also be established.'

"These facts, so set forth by the President, with the assertion of the right of blockade, amount to a declaration that civil war exists.

"Blockade itself is a belligerent right, and can only legally have place in a state of war; and the notorious fact that immense armies, in our immediate view, are in hostile array against each other in the Federal and Confederate States, the latter having organized a government and elected officers to administer it, attests the Executive declaration that civil war exists; a sad war, which if it must go on, can only be governed by the laws of war, and its evils mitigated by the principles of clemency, engrafted upon the war code by the civilization of modern times.

"Nor does the assertion of the right in the proclamation of the 19th of April, 1861, to proceed against privateersmen, under the laws of the United States, as *pirates*, militate against the construction I have above given, of the two proclamations as averring the existence of civil war.

"In the case of *Rose* vs. *Himely* (4 Cranch, 272,

273), Chief-Justice Marshall, in delivering the opinion of the court, says: 'It is not intended to say, that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law and the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.'

"In this case I am sitting in admiralty, adjudging a question of prize, under a capture for alleged violation of blockade.

"I do not find, on examination of the writers on public law, any difference as to belligerent rights, in civil or foreign war, and Judge Story, in the 7th Wheaton, as heretofore cited by me, says they are the same. Blockade, being one of the rights incident to a state of war, and the President, having in substance asserted civil war to exist, I am of opinion that the blockade was lawfully proclaimed by the Executive."

Case of *The General Parkhill.* United States District Court for the Eastern District of Pennsylvania.

The next case in order of time of adjudication, is that of *The General Parkhill*, decided in the District Court of the United States for the Eastern District of Pennsylvania.

This vessel was captured on the 12th of May,

1861, while attempting, as alleged, to violate the blockade of Charleston, South Carolina, and sent for adjudication to the port of Philadelphia.

The claim interposed on behalf of the owners of the captured property, described the claimants as "of the city of Charleston, in the state of South Carolina, and citizens of the United States."

Opinion of Mr. Justice Cadwallader.

"They are," says the court, "by their own showing, commercial residents of South Carolina. The question which thus arises, independently of that of blockade, is whether, in the present hostile relation of South Carolina, a resident of that state can sustain a proprietary claim of restitution in a prize court of the United States."

The general proposition established in the law of nations, is thus clearly stated:—

"One of the purposes of naval warfare, is to diminish the power of hostile governments, or of other hostile organizations, by the indiscriminate maritime capture of the private property of all persons, residing in places within hostile dominion, or in permanent or temporary hostile occupation. The capture and confiscation of such property, by destroying or suppressing the maritime trade of such places, diminishes, and thus reduces the power of their hostile rulers. The liberation of the property when captured, whether the individual residents who owned it are personally well or ill affected in feeling toward the government of the captors, would restore its value in wealth to the hostile place."

The court then proceeds to enforce this doctrine, as well by historic illustration as by citation of judicial authority, showing it to have been applied

equally in civil as in public or international warfare, and adds:

"If during an organized hostile contest, like the present, against an established government, rules of decision, different from those which have been stated, prevailed in the prize courts of such a government, it could not effectively prosecute maritime hostilities to suppress rebellion or insurrection.

"The question is, whether any different rules of public law determine the question of confiscability, during such a contest."

The learned court then proceeds, in a disquisition of great research and ability, to consider the various kinds of civil war, as distinguished by the various purposes for which they are waged, in order to the determination of the question, whether the government, in resisting its opponents, may, under the law of nations, treat the contest as if it were a foreign war, and the places in the possession of the insurgents, as if occupied by public enemies.

In this connection, is cited the opinion of Grotius upon the views of Demosthenes, in a case so singularly analogous to the one under discussion, as to give to that opinion not only a peculiar interest, but, in the language of the court, "the force of a modern precedent."

"In the opinion of Grotius, Demosthenes had, in the case of the Thracian Chersonese, correctly stated the rule of public law to be, that wherever judicial remedies are not enforceable by a government against its opponents, the proper mode of restoring its authority, is war. (De Jur. Bel. et Pac. Proleg., § 23.)

"The Chersonese was a dependency of Athens,

when other parts of Thrace were under the dominion of Macedonia. The city of Cardia, in the Chersonese, resisted the Athenian authority. Deiopeithes, the Athenian commander in the Chersonese, was prevented from reducing the Cardians to submission, through the interference of Philip of Macedon—then professedly at peace with Athens—who sent a military force to their assistance.

"Deiopeithes, considering this measure an act of hostility on the part of Philip, at once, without waiting for instructions from Athens, invaded and ravaged parts of Macedonian Thrace.

"Philip complained to the Athenians of this conduct of Deiopeithes. Demosthenes, in sustaining it, avoided assuming a defensive position as to the previously intended subjugation by Deiopeithes of the Cardians, but incidentally justified it, upon reasons that would have sanctioned the prosecution of hostilities against them, on the same footing as if the war had been, as to them, a foreign one.

"Dismissing from consideration the charges against persons, whom the judicial administration of the laws could reach, and who might, at any time, be judicially prosecuted, he contrasted their case with that of those whom the laws could not thus reach, saying, that attempts to enforce like remedies against them, would only disorder and confuse the administration of public affairs. 'Against those' said he, 'whom the laws cannot reach, we must proceed as we oppose public enemies, by levying armies, equipping and setting afloat navies, and raising contributions for the prosecution of hostilities.'"

The peculiar applicability of this doctrine to the civil war in the United States, is clearly set forth

by a designation of the character of that war, in the following terms:

"The exercise of the established jurisdiction of the government, has been revolutionarily suspended in one or more territorial districts, whose willing or unwilling submission to the revolutionary rule, prevents the execution of the suspended government's laws in them, except at points occupied by its military or naval forces."

The court then proceeds to state: "The rule of the common law is, that where the regular course of justice is interrupted, by revolt, rebellion, or insurrection, so that courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing, as if those opposing the government were foreign enemies invading the land. The converse is also *regularly* true, so that when the courts of a government are open, it is ordinarily a time of peace. But though the courts be open, if they are so obstructed and overawed that the laws cannot be peaceably enforced, there might, perhaps, be cases in which the converse application of the rule would not be admitted. (1 Knapp, 346, 360, 361; 1 Hale, P. C., 347; Co. Litt., 249, *b*.)

"The present case is one in which the courts are in the strongest sense closed. That such a war as the present, should be restricted in the modes of its prosecution, within limits more narrow than foreign wars, would prostrate its purpose, and place the former established government on an unequal footing with its hostile opponents. The doubt heretofore suggested, has been, whether the former government has not, in such a contest, greater belligerent privileges than in a foreign war.

"By a treaty between England and the States General, their merchant vessels might, when England was at war, carry her enemy's goods without their being liable to capture. In the war of American independence, it was decided in an English prize court, that this treaty did not exempt the ships and goods of rebellious Americans, carried in Dutch merchant vessels, from confiscability. (*The Aletta*, cited 1 Hay and Marriott, 13.)"

In illustration of the doctrine, discussed at some length in the first edition of this work, that a nation while engaged in the performance of the duty of suppressing a domestic insurrection, which aims to overthrow the established government, may lawfully exercise belligerent as well as sovereign rights, as declared by Chief-Justice Marshall, in the case of *Rose* vs. *Himely*, the learned judge, in a note to his opinion, furnishes a valuable recital of the circumstances, out of which the discussion in that case grew, and elucidates the doctrine which was laid down and not questioned, both in the Supreme Court of the United States, and the Supreme Court of Pennsylvania.

It is the doctrine which lies at the foundation of this whole discussion. It cannot be too often or too emphatically enforced.

A vast deal of the protracted disputation upon the war measures of various kinds, proposed in either house of the Congress of the United States, at its last session, evinced a singular want of appreciation of this fundamental doctrine.

The following is the text of the note to which allusion has been made:

"During the civil war between the French Re-

public and the revolted negroes of St. Domingo, the French, having been driven out of possession of the principal part of the island, their government prohibited all maritime communication with places on its coast occupied by the rebels, under the penalty of confiscation of vessels and cargoes; and afterward imposed the like penalty in all cases in which vessels going to or from such places might be captured at anchor, or under sail at a distance of less than two leagues from the coast. Merchant vessels of the United States trading with such places, having been captured at sea, at distances, in some cases of less, and in others of more, than two leagues from the coast, were alike condemned in French prize courts. The judges of the Supreme Court of the United States, agreed in opinion that the French government's ancient sovereignty over the colony, must be considered as still subsisting. That France might exercise belligerent rights in the contest, in addition to those of her sovereignty, was asserted by Chief-Justice Marshall, and denied by no other judge. A majority of the judges ultimately differed from him in opinion upon the question, whether, if the above mentioned acts of the French government were to be considered, not as belligerent, but as mere municipal regulations, the proprietorship of the former owners of the vessels and cargoes had been divested by the judgments of confiscation, where the captures had been made more than two leagues from the coast. The majority of the court was ultimately of opinion that, whatever might have been, in this respect, the legal character of the regulations, the proprietorship had been changed by the judgments in these cases, as well as in those in

which the captures had been within the two leagues. (4 Cranch, 513, 272, 293; 6 Cranch, 281, 285.) The Supreme Court of Pennsylvania was afterward of opinion that the property had been changed in both cases. Chief-Justice Tilghman considered the acts of the French Republic as, not simple municipal regulations, but municipal regulations 'connected with a state of war with revolted subjects,' in enforcing which 'the Republic might avail itself of all rights which are given by the law of nations to a government thus circumstanced.' He said, 'The government of the United States has taken no part between the contending parties. It has never acknowledged the independence of the revolters. We are not at liberty, therefore, to consider the island in any other light than as part of the dominions of the French Republic. But, supposing it to be so, *the Republic is possessed of belligerent rights*, which may be exercised against *neutral* nations who carry on commerce with the revolters. *This is not denied;* but it is said that the words of the *arrêté* prove that there was no intention to exercise such rights. This argument is not conclusive. Although the French government, from motives of policy, might not choose to make mention of war, yet it does not follow that it might not avail itself of all *rights to which, by the law of nations, it was entitled under the existing circumstances*, under the *form* of a law made for the regulation of the trade and commerce of one of its colonies. This was the course pursued by Great Britain in the revolutionary war with the United States; and it has not been supposed that she violated the law of nations, when she captured and confiscated

the vessels of neutrals who carried on trade with the United States, in whatever part of the ocean they were found by her ships of war and cruisers. (3 Binney, 252, 253.)"

The court, from this, proceeds to an elaborate and very learned review of the origin of the jurisdiction exercised in prize cases, for the purpose of facilitating the application of the authorities and the cognate doctrine next considered, as to what is regarded by such courts *confiscable*, or *enemies property*, and concludes as follows:

"During a civil war against an established government, the phrase *enemies' property*, as understood in prize courts of this government, includes all property captured at sea, which is actually or constructively hostile. During the civil war in Portugal, between the Queen and Don Miguel, she established a blockade of ports along the coast of her own kingdom. In a case already cited, the Supreme Tribunal of Marine at Lisbon, having condemned as prize, a vessel of English ownership, which had been captured for attempting to break the blockade, and supply Don Miguel's adherents with warlike stores, it was held by a British court, in the year 1836, that the judgment of the Portuguese prize court, whether on the ground of an attempted breach of blockade, or on that of an attempted supply of contraband goods, was conclusive proof that the vessel was owned by *enemies* of the Queen of Portugal, though Portugal was not then at war with any foreign government. (3 Scott, 202, 203, 228; 2 Bingh. N. C., 781, 782, 783, 798.)"

"At the time of the Duke of Monmouth's rebellion, in 1685, the goods of rebels which were cap-

tured at sea, appear to have been condemned in England as prize, in the Court of Admiralty. (Hay and Marriott, 47, 48.) This occurred likewise at the rebellion of 1715. The case of the ship *Duke de Vendome*, determined in 1816, was cited by Sir George Hay. (Hay and Marriott, 47)."

During the war for American independence, in the reported decisions of the English Admiralty Court, the successive judges exhibited strong desires to find reasons for exempting from confiscation, the captured property of persons residing in the United States, who adhered to the British cause. But by reference to these decisions (H. & M., 46, 78, 80, 94, 95, 83, 212, 216), it will be seen that both Sir George Hay and Sir James Marriott condemned all the property of all loyal colonists, except such as they took with them in the same vessel to England.

The learned judge thus briefly disposes of the sole remaining objection for determination, namely, that the President had no authority, without previous congressional legislation, to direct or regulate the prosecution of hostilities, because such direction and regulation could only be exercised when war actually exists, and that war can only exist as the result of the action of Congress.

"This objection," says the court, "is insufficient. Any nation may be involved in a war which has not been declared, and as to which her government has not legislated. Judges of English prize courts have agreed with Bynkershoek in the opinion, which publicists no longer dispute, that the legal consequences of an actual war must be the same, whether it has or has not been formally declared. The only modern intimations of a contrary opinion as to a

foreign war are in Stewart's Reports, pages 304 and 414, which I consider as overruled, in 1 Dodson, 247. (See Hay and Marriott, 252, 253.)

"In the course of the argument *partial* war with a foreign state seems to have been somewhat confounded with *informal* war. A partial war may be informal, or may be more or less, or quite formal. But the present inquiry does not involve any distinctive doctrines of public law concerning partial war. Therefore, the cases which arose under acts of Congress authorizing the limited hostilities prosecuted against France, at the close of the last and commencement of the present century, may be dismissed from consideration.

"In 1846, when Congress was in session, the United States were involved in a general war which was informally begun. The war which Mexico had for some time threatened, then broke out suddenly. Congress thereupon declared that, by an act of Mexico, a state of war existed between her government and the United States. If no such law had been enacted, there would, not the less, have been war with Mexico. The President must, then, as commander-in-chief of the army and navy, have directed its prosecution conformably to the rules of public law. This he must, at all events, have done, if Congress had not been sitting when the Mexicans attacked our army.

"The case of a civil war is practically the same. The marshal of the United States, in order to keep the peace of his judicial district, and enable himself to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a warlike force. (Year B., 3 H., 7 pl. 1, 5 Co.,

72, *a*; Br. Riots, pl. 2; Dalton, ch. 95; 8 Watts & Serg., 191; 5 Carr & P., 254, 282.) When he cannot, by such means, keep the peace of his district, and the courts in it no longer can direct their process to him, a state of war exists.

"The President in such a case is required by the Constitution to 'take care that the laws be faithfully executed.' While other officers only swear to support the Constitution, his official oath, as prescribed in it, requires him 'to the best of his ability' to 'preserve, protect, and defend the Constitution.' Therefore, when hostilities actually waged against the Constitution and laws, assume the dimensions of a general war, he must prosecute opposing hostilities, offensive as well as defensive, upon such a proportional scale as may be necessary to re-establish, or to support and maintain the government.

"But he cannot[1] make 'rules concerning captures on land and water.' The Constitution has vested this power in Congress. The President cannot prosecute hostilities otherwise than according to the directions of existing acts of Congress, or to the rules of public law. Without his orders, an officer of the navy capturing this vessel would have performed a lawful act. Had the President forbidden her capture, the officer might have been punishable for disobedience of orders, but the vessel should not for that reason be liberated by a prize court, if she was in law confiscable.

"The claim is rejected."

The next case, or rather series of cases, were

[1] See 8 Cranch, 126 to 129, 427; 9 Cranch, 422, and the Acts of Congress of March 3d, 1799, ch. 45; and March 3d, 1813, ch. 71.

adjudicated in the District Court in New York. And here it is proper to state, that these adjudications in the several districts, of Columbia, of Pennsylvania, of New York, of Massachusetts, and of Maryland, were so nearly simultaneous, that the eminent judges had no opportunity of consultation, and their respective opinions may therefore be regarded as independent authorities upon the important questions submitted to them.

It is for this reason, superadded to that of the absorbing interest of the questions themselves, that a more liberal quotation from the respective opinions is indulged in, than might be desirable, if either of the learned judges had been controlled in his determination by the precedent of the other.

The cases of *The Hiawatha*, *The North Carolina*, *The Pioneer*, *The Crenshaw*, *The Winnifred*, *The Hannah M. Johnson*, *The Lynchburg*, *The General Green*, *The Hallie Jackson*, and *The Forest King*. United States District Court for the Southern District of New York.

The cases in which the fundamental questions were discussed and determined, in the district of New York, were ten in number, and as follows: *The Hiawatha*, *The North Carolina*, *The Pioneer*, *The Crenshaw*, *The Winnifred*, *The Hannah M. Johnson*, *The Lynchburg*, *The General Green*, *The Hallie Jackson*, and *The Forest King*.

By consent, they were considered together, so far as the fundamental questions were concerned, as one case; but the utmost latitude of discussion was accorded by the court, to an array of counsel of distinguished ability, who represented the vast pecuniary interests of the respective claimants, and the questions raised were presented by them, severally, in exhaustive arguments of nine days duration, and were subsequently enforced by elaborate printed briefs. A statement of the facts of one case will suffice for all.

The ship *Hiawatha*, a British vessel, arrived in

the James River, at City Point, a little below Richmond, on a voyage from Liverpool, with a cargo of salt, on the 29th of April, 1861, one day prior to the date of the proclamation of Commodore Pendergrast, announcing the effectiveness of the blockade of that river, which was ordered by the Executive proclamation, of the 19th of April. The voyage of the ship was projected, to include a return to Liverpool, with a cargo of cotton and tobacco. Such cargo was laden on board, in the blockaded port, on and after the 11th day of May ensuing, and on the 16th day of May, the same being after the expiration of the fifteen days from the actual establishment of the blockade (allowed to neutral vessels to leave the blockaded ports, as they were with respect to cargo, at the time they first knew of the blockade), the ship, with her cargo thus laden on board, commenced her voyage out of the river, and was captured outside, by one of the blockading vessels.

As will be seen by this statement, there were subordinate questions of interest, involved in this adjudication, as was also the case in the proceedings against the other vessels. These questions and their determination, are noticed in their proper connection. That portion only of the opinion of the distinguished judge will be here given, which directly relates to the fundamental questions common to all the cases.

After a brief review of the nature and character of the jurisdiction and proceedings of prize courts, and a lucid, preliminary statement of the points raised and presented in the arguments, the learned judge says:

Opinion of Mr. Justice Betts.

"It is insisted on the part of the defence, that the President, under the Constitution, had no power, upon the facts before the court, to institute, declare, or recognize, by executive acts, a condition of war between the United States and the insurgents and their forces, which will carry with it, in behalf of the United States, the incidents of a public war, in relation to their enemies in this contest, and also to neutral nations, as between them and this government. As consequent to that position, it is urged that the steps taken by the President to establish a blockade of ports in the possession of the insurgents, are inoperative and void to that end, because the insurgents cannot be, within the meaning of the public law, enemies of the United States, but are only citizens of the same country in a state of internal and domestic contention; and because the President has no authority, under the Constitution and laws of the United States, to declare and impose a blockade of any port or place, and particularly not of one within the limits of the United States; and further, that the preliminaries and conditions indispensable to a valid blockade, by the law of nations, have not been observed and fulfilled in any of the cases now on hearing.

"It is first to be observed in respect to the general bearing and features of these defences, which seem grounded on the assumption that the President initiated and inaugurated the war against the rebels or insurgent enemies, that no public or private document or official act of the President is given in proof, conducing to show that the existing state of hostilities was produced by any authority or act of the government of the United States. The war, so

far as the government have been proved to be actors in it, and so far as the evidence characterizes it, has been wholly defensive, and in protection of the property and existence of the government itself, and in no particular, up to the captures in question, did it partake of the character of an offensive and aggressive war, in its conduct on the part of the United States.

"The question pressed earnestly during the discussion, whether the President, without the authority of Congress, can declare or initiate an offensive war, therefore, becomes merely speculative on the merits of the debates. The inquiry is, if he is, by the Constitution and laws of the country, clothed with power to defend the nation against an aggressive war waged for its extermination by internal enemies; and if so, what public condition in relation to the belligerents and neutral powers results from such warfare.

"Much stress has been laid in the progress of the argument on the want of an open declaration of war by the President, previous to his adopting and employing forcible means to repel or counteract warlike measures of an enemy, persisting in hostile attacks on the government and its property.

"No one can claim as a right that a public declaration of war shall be promulgated, unless it be the nation by whose government it is made, and then it serves only as a notice to their own citizens or subjects. The declaration by manifestoes, heralds, or nuncios, does not constitute war, and the omission of the declaration can no way impair its justness or efficacy, especially in a case of defensive war. (1 Kent, 51, 54. Wheat., on Captures, 13, 15. *The*

Eliza Ann, 1 Dod.'s Rep., 247; Duponceau, on War, chs. 1, 2.)

"A civil war of alarming proportions was waged with extraordinary forces and activity; to promote the public defence, and impair the resources of the enemy, the President proclaimed the blockade of the ports referred to in the pleadings and proofs before the court. If the competency of a foreign government to question, in a prize court, the power of a belligerent to institute a blockade be conceded, or to do more than exact a strict observance of public law in maintaining and enforcing such blockade by the belligerent who imposes it, I am not convinced by the proofs or argument adduced in opposition to the cases on trial, that the lawfulness or efficiency of the blockade established have been impeached. I hold, in time of civil war, of insurrection, and rebellion, the nation assailed and attacked by hostile and rebel forces, may rightfully resist war levied against itself, alike by closing, embargoing, or blockading ports held by their enemies, as a means of war calculated to weaken and defeat hostile operations to its detriment, as to accomplish the end by direct force and superior power; and that no sound distinction exists whether such defensive proceedings are employed in civil, internal, or domestic warfare, or war between nations foreign to each other. Under the law of nations, the rights incident to a war waged by a government to subdue an insurrection or revolt of its own subjects or citizens, are the same in regard to neutral powers as if the hostilities were carried on between independent nations, and apply equally in captures of property for municipal offences, or as prize of war

(*Rose* vs. *Himely*, 4 Cranch, 241. *Ibid.*, appendix, 509. S. C. in Circuit Court, 4 *Ibid.*, 293. *Hudson* vs. *Gustien*, 7 Wheat., 306, *Santissima Trinidada.*

"Commercial ports, in time of war, may become efficacious allies to an enemy holding them, through neutral trade. So far as that aid avails the enemy, it is warlike in its nature, and may be repelled by war means. Blockade is the measure recognized by the law of nations as the appropriate remedy, and that in character and operation is peaceful as to neutrals, and warlike in respect to the enemy. The President, as commander-in-chief of the army and navy, is the functionary, under our government, who has, as incident to his office, the power and right to exercise the resisting and repelling means of legitimate warfare, whenever the exigencies of the case require them.

"It certainly can be of no consequence whether the ports blockaded belong technically or in reality to the United States, or were the property of individuals, innocent of any warlike purposes against the United States, or of aiding its enemies. It is sufficient if the evidence shows the ports to be under the power and use of enemies of the United States. This use may be an usurped one, and in wrong of the actual proprietary authority of the places. The right of the United States to prevent such use being turned to their prejudice, rests not at all upon the character of the true ownership and rightful authority over the places, but on that of their employment by the occupants. Whilst under the military power of an enemy it is enemy's territory. (*U. S.* vs. *Rice*, 4 Wheat., 253. This consideration meets, also, another ground of defence,

earnestly urged on the part of the claimants, that these various ports which are subjected to blockade are portions of states of the Union, and, as such, a portion of the Union itself, and cannot, therefore, be made, territorially, objects of hostile control, but only of municipal regulation and government. Nor that more eminently can they become, as countries or people, enemies of the government of which they are constituent parts; because, in that relation, they also hold an independent sovereignty as states, which cannot be infringed nor molested by authority of the United States, acting directly upon that independency.

"The Union is not composed of subtleties and abstractions. The notion of a government constructed of numerous parts, each part separate and sovereign in itself, and also sovereign of, or as against the whole, was never adopted or declared by the founders of the Constitution, and probably not contemplated or comprehended at that day.

"The officers of the United States government, act within particular states, to enforce or defend the laws of the United States the same as if no state demarcation existed. The whole extent of the country is one nation and one government. In respect to the United States and its constitutional laws, there are no state lines, and state sovereignty is a nonentity.

"The denominations of states existing for local and domestic purposes, are made use of and applied by the insurgents in the present war, in designation of combinations of persons disrupted, so far as they had material or political power so to do, from their citizenship of and subjection to the government of

the United States, in disavowal and defiance of that allegiance, and, so far as their own purposes and acts can fix their political *status*, make themselves as alien and foreign from the United States government, as if they assumed the name of citizens and subjects of various states of Mexico or South America.

"They thus make themselves avowed enemies, and wage war against the United States to accomplish its dismemberment and destruction. It can be of no consequence under what name or appellation those enemies unite and act, whether as states, secessionists, southerners, or slaveholders; they are, in every just contemplation of our system of government, insurgents and rebels against a common government, and waging war for its overthrow.

"The organism of states which furnishes a form of government for peaceful and domestic purposes is thus sought to be perverted by the insurgents into alien sovereignties, which may exercise, under the familiar name of states, independent and coequal capacities with the national government. Such names or pretensions can have no effect to change the intrinsic nature of things, and transform the residents of particular states into any thing else than citizens and subjects of the United States, and, as such, subordinate to its Constitution and laws.

"But, by the instrumentality of the pretences and means employed, the insurrection has become developed into a hostile power of great magnitude and force, disavowing all unity with or subordination to the mother country, and taking to itself the attributes of a distinct nationality. It thus discards all common rights under the Federal government, and,

by force of arms, wages war to establish one overpowering that of the parent nation. They become enemies of the United States government by open hostilities waged against it, without losing their subjection to it individually as citizens. Government represses their rebellion and treason legitimately, by force of arms and war, because the magnitude and force of the revolt is beyond the control of the law and civil magistracy. To that end, all the constitutional powers of the President, in his capacity of commander-in-chief of the army and navy, may be rightfully called into exercise. They confront the government in masses of armed men, holding fortified posts, or ports of trade and general commerce, and they thus become belligerents and enemies of the nation, against whom all the means of war allowed by the law of nations may be rightfully employed, as was held by the Supreme Court in the case of the St. Domingo insurgents. (4 Cranch, 241.) For the reasons hereafter suggested, I forbear adding a further support by citation of authorities, than reference to a very few upon fundamental points, and taken generally from decisions in our own courts.

"In my judgment, therefore, every branch of the general defences set up against these suits is inadequate and insufficient in law and fact to bar the prosecutions pending. I consider that the outbreaks in particular states, as also in the Confederate States, was an open and flagrant civil war, waged against the United States by the insurgents in the several disaffected states, referred to in the pleadings and proofs in these several causes, at the time the several proclamations, so also referred to

and named, were issued and made by the President: That such insurrection was maintained by warlike means and forces too powerful to be overcome or restrained by the civil authority of the government, and that it became lawful and necessary to resist and repel hostilities so levied against the United States and its laws, by aid of the army and navy of the United States: That the President possessed full competency, under the Constitution of the United States, and the existing laws of Congress, to call into service and employ the land and naval forces of the United States, in the manner they were used by him, for the purpose of maintaining the peace and integrity of the Union, and putting down hostilities waged against them; and the President had, rightly, power to establish blockades of ports held by those enemies, and enforced such blockades pursuant to the law of nations."

The intelligent reader will find nothing to regret in the length of the preceding quotation.

In thought and expression it is alike characteristic of its distinguished author.

His cotemporaneous decisions in the law of maritime capture—with this opinion upon the great fundamental questions involved in all his adjudications, will be preserved as instructive precedents, and as valuable memorials of the vigorous and comprehensive intellect of him who has long been one of the brightest ornaments of the Federal judiciary.

The case of *The F. W. Johnson.* U. S. District Court for the District of Maryland.

The next case to be considered is that of *The F. W. Johnson*, decided in the United States District Court for the district of Maryland.

This vessel was captured for an alleged violation of the blockade of the port of Norfolk, in Virginia, and as enemy's property, being owned by a citizen of Norfolk.

The questions raised in the preceding cases, were here discussed with great ability, by distinguished counsel.

In disposing of them the learned judge says:

Opinion of Mr. Justice Giles.

"It has been contended by the counsel for the claimants that, in the present unhappy division in our country, the government at Washington has no power, either under the Constitution of the United States, or by the recognized principles of the law of nations, to treat the inhabitants of the states which claim to have seceded, as enemies, and to exercise in reference to them those belligerent rights which all concede belong to parties engaged in a public war. And, by a public war, is here meant a war between independent sovereign states. Now, I am sitting in this case, in a prize court, and the Supreme Court said (the case of *The Rapid*, 8 Cranch's Reports, 155, and the schooner *Adeline* and cargo, 9 Cranch, 264), 'that the law of prize is a part of the law of nations.' And I am, therefore, to decide this question by the principles of that universal law, to which all civilized princes and states acknowledge themselves to be subject.

"In the first place, let us see what is the character of the present contest in this country, and in what light it has been regarded by the executive and legislative departments of the government. In the face of all that is passing around us, it needs no argument to show that a civil war of gigantic dimensions is sweeping over the land. We are

almost within sound of the cannon of two of the largest armies that have ever been marshalled in hostile array against each other on this continent. More than one-third of the confederacy has claimed to separate from the rest, and they are now fighting about the construction of the organic instrument of the government—one side alleging that under a true construction of the Constitution, each state has a right to withdraw from the Union whenever its people so determine; the other, that no such right exists, and that to attempt to secede is rebellion, and not the exercise of any constitutional right. And in the states which have claimed the right to withdraw, there are now open no courts of the United States, and the laws of the United States cannot now be executed in those states, by the ordinary course of judicial proceedings.

"Is this not civil war? And has it not been so regarded by the executive department of the government? This is clear from the proclamations of the President of the 15th of April, of the 19th of April, of the 27th of April, of the 3d of May, and of the 10th of May, all recognizing the fact that the civil power of the government is no longer capable of enforcing the laws, and calling to its aid the power intended to be provided by the acts of 1795 and 1807, and, also, using the power of blockade, a war power belonging only to belligerents either in a civil or foreign war. And the legislative department has also recognized this contest as a war. For, during the last session of Congress, it not only did so by the laws which it passed for the raising of armies and providing means for their support, but in express language, on (four) different occa-

sions, as will be seen by reference to the laws of the extra session of July last, pages 268, 274, 315 and 326. And the last law (p. 326), to which I refer, not only recognized a war as existing, but it approved and sanctioned all the proclamations of the President, thereby making valid the blockade declared by the President in his proclamations of the 19th and 27th of April, if the President alone, '*as commander-in-chief of the army and navy of the United States*,' did not possess this power under the existing circumstances of the country.

"The Supreme Court (Chief-Justice Taney delivering the opinion) in the case of *Luther* vs. *Borden and others*, 7 Howard, 45, say: 'Unquestionably a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential *to the existence of every government*, essential to the preservation of order and free institutions, and is as necessary to the states of the Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military force, and the declaration of martial law, we see no ground upon which the court can question its authority. *It was a state of war*, and the established government resorted to *the rights and usages of war* to maintain itself and overcome the unlawful opposition.'

"Now what say the writers on the law of nations? Vattel says, in book 3d, ch. 18, p. 425, 'When a party is formed in a state who no longer obey the

sovereign, and are possessed of sufficient strength to oppose him, or where, in a republic, the nation is divided into two opposite factions, and both sides take up arms, this is called a *civil* war. Some writers confine this term to a just insurrection against their sovereign, to distinguish that lawful resistance from rebellion which is open and unjust resistance.

"'But what appellation will they give to a war which arises in a republic torn by two factions, or in a monarchy, between two competitors for the crown? Custom appropriates the term *civil war* to every war between the members of one and the same political society.'

"And Wheaton, in his great work on international law, says, on page 365: "A civil war between the different members of the same society, is what Grotius calls a mixed war. It is, according to him, public on the side of the established government, and private on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling the contending parties to all the rights of war as against each other, and even as respects neutral nations.'

"Judge Chase, of the Supreme Court, in the case of *Ware* vs. *Hilton and others*, 3 Dallas, 199, speaking of the effect of the act of the Virginia Convention, in June, 1776, and the declaration of independence by Congress, on the 4th of July following, says: 'Before these solemn acts of separation from the crown of Great Britain, the war between Great Britain and the United Colonies, jointly and separately, *was a civil war;* but instantly, on the great and ever memorable event, the war changed

its nature and became a public war between independent governments; and immediately thereupon all the other rights of an independent nation attached to the government of Virginia.'

"Whether the learned judge be correct in his view, that the war became a *public war* after the declaration of independence, a view he may be excused from taking, if wrong, as his own name was appended to that imperishable document, we have the sanction of his great name to the doctrine, that to such a contest there belonged all the rights of war.

"I am therefore clear in the opinion, that, as a blockade is an acknowledged belligerent right under the law of nations, where war exists, the blockade of the southern ports was lawfully proclaimed by the President.

"In the discussion of this question, I have said nothing in reference to the sovereign rights of the government: whether it may not at the same time exercise both sovereign and belligerent rights. Such a question does not arise in the case. I have confined myself to the examination of the existence or not of belligerent rights by the government, in reference to the present unfortunate state of the country.

"And Phillimore, in his commentaries on international law, vol. 3d, page 740, gives us a simple rule by which to determine this question. He says: 'In the case of a civil war, the English law furnishes a good criterion as to whether the country is to be considered at peace or at war—that whenever the king's courts are open it is a time of peace, in judgment of law.'

"Judged by this standard, then, as the Federal

courts are closed in the Southern States, there is a state of civil war. And the government is remitted to its belligerent rights, to be exercised in accordance with those maxims of humanity, moderation, and honor which the law of nations has prescribed to be observed by both parties in every civil war."

The case of *The Amy Warwick.* U. S. District Court for the District of Mass

The last case to be considered, but by no means the least in interest and importance, in view of the eminent character and ability of the counsel, by whom the arguments were conducted, and the great learning of the distinguished judge, to whom they were addressed, is that of the *Amy Warwick*, which was decided in the District Court of the United States for the district of Massachusetts.

The vessel, with a cargo of coffee, sailed from Rio de Janeiro on the 29th of May, 1861, bound for Hampton Roads, and was captured on the 10th of July, by the United States cruiser *Quaker City*, and sent to the port of Boston for adjudication, as prize of war, in the district of Massachusetts.

Condemnation was claimed on the ground that the prize was enemy's property, being owned by citizens of Richmond, in the state of Virginia.

After a brief consideration of the established rules and principles in the law of nations, as to what shall be deemed enemy's property, the learned judge proceeds at once to the discussion of the great questions at issue. It is here given in its entirety. Not to do so, would be doing injustice to one of the ablest judicial disquisitions upon the legal character of the civil war in the United States, proceeding from a judge whose long experience, and

exalted reputation as a jurist, give to his opinions the weight of authority:

Opinion of Mr. Justice Sprague.

"But it is contended that although this property might be liable to confiscation if the contest were a *foreign* war, yet that it is otherwise in a rebellion or civil war. This requires attention. As the Constitution gives Congress the power to declare war, some have thought that without such previous declaration, war in all its fulness, that is, carrying with it all the incidents and consequences of a war, cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either. If a foreign nation should send its fleets and armies, to capture our vessels, ravage our coast, and invade our soil, would not this be war—giving to the United States, as a nation, the position and rights of a belligerent?

"Such hostilities would impose upon the President the duty of exerting all his powers, as commander-in-chief of the army and navy, to capture or destroy the enemy, and if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law.

"How this civil war commenced, every one knows. A traitorous confederation, comprising several organized states, after seizing by force several forts and custom-houses, attacked a fortress of the United States, garrisoned with their soldiers, under the sanctity of their flag, and by superior military force compelled those soldiers to surrender, and that flag to be lowered. This was war—open, flagrant, flagitious war; and it has never ceased to be waged by the same confederates, with their utmost ability.

"Some have thought that because the rebels are traitors, their hostilities cannot be deemed war, in the legal or constitutional sense of that term. But without such war, there can be no traitors. Such is the clear language of the Constitution. It declares that treason against the United States, 'shall consist only in levying war against them; or in adhering to their enemies, giving them aid and comfort.' Some have apprehended that, if this conflict of arms is to be deemed war, our enemies must have, against the government, all the immunities of international belligerents. But this is to overlook the double character which these enemies sustain. They are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States sustain the double character of a belligerent and sovereign, and have the rights of both. These rights coexist, and may be exercised at pleasure. Thus, we may treat the crew of a rebel privateer merely as prisoners of war, or as pirates, or traitors; or, we may, at the same time, give to a part of the crew the one character, and to the residue the other. And, after treating them as prisoners of war, we may exercise our sovereign power, and deal with them as traitors. The temporary non-user of such rights is not a renunciation of them, but they may be called into practical exercise at pleasure. In modern times, if a rebellion has assumed such dimensions as to raise armies and involve great numbers, it has not been usual during the contest, to exercise toward prisoners the sovereign right of dealing with them as traitors. They have generally been treated as prisoners of war until the contest is over. But this forbearance does not

preclude their government from afterward inflicting such punishment as justice and policy may require.

"Mr. Wheaton, in his Elements of International Law, p. 365, so strongly maintains belligerent rights in civil war, that some of his language would imply that there are no other rights. This, however, could not have been intended; for, if sovereign rights be at an end, the war is merely international. Civil war, *ex vi termini*, imports that sovereign rights are not relinquished but insisted on. The war is waged to maintain them. *Rose* vs. *Himely*, 4 Cranch, 272, was a case arising out of the exercise of sovereign rights by France, in her civil war with St. Domingo. The court recognized the coëxistence of belligerent and sovereign rights. *Cherriot* vs. *Foussatt*, 3 Binney, 252, also arose out of a municipal regulation made by France, in the same civil war, and the court remarked that France was possessed of belligerent rights which might be exercised against neutral nations. *Dobrie* vs. *Napier*, 3 Scott's R., 225, arose out of the blockade of the coast of Portugal by the Queen of that country, and the condemnation of a vessel as prize for the breach of it, was holden to be valid. See also the *Santissima Trinidad*, 7 Wheat., 306, and *United States* vs. *Palmer*, 3 Wheat., 635.

"The United States have, during the present war, exercised both belligerent and sovereign rights.

"Examples of the former are, receiving capitulations of the enemy as prisoners of war, and holding and exchanging them as such; and a still more prominent instance is the blockade, which, before the assembling of Congress, was established by the military authority of the commander-in-chief.

"I am satisfied that the United States, as a nation, have full and complete belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have superadded the guilt of treason to that of unjust war.

"But it is insisted that if these rights exist, still the authority to exercise them, by arresting and condemning enemy's property, must emanate from the legislature, and that there has been no legislation authorizing this capture.

"Congress has established permanent prize tribunals, and created an army and navy. The Constitution declares that the President shall be the commander-in-chief of the army and navy of the United States. He is thus clothed with all the power appertaining to that high office, and he is not only authorized, but bound, to exert it, when the exigency for which it was given shall arise. If a hostile power, either from without or within our territory, shall assail and capture our forts, and raise armies to overthrow our government, and invade its soil, and menace the capital of the nation, and shall issue commissions to public and private armed ships to depredate on our commerce, the President is bound to use the army and navy to carry on the war effectively against such an enemy, both by land and by sea. And he may do so in the manner, and by the measures, usual in modern civilized warfare; one of the most familiar of which, is the capture of enemy's property, public and private, on the ocean.

"In war, the commander-in-chief is not only authorized to make captures by sea and conquests by land, but he may even govern the conquered territory until Congress shall have seen fit to interpose by

legislation. In our last war, California having been subjugated, the commander-in-chief imposed duties, established custom-houses, and collected revenues; and this was sanctioned by the Supreme Court as a legitimate exercise of military power. (*Cross et al.* vs. *Harrison*, 16 Howard, 164.) There can be no doubt of the right of the President to make maritime captures, and submit them to judicial investigation. It is one of the best established, and least dangerous, of his powers, as commander-in-chief. Further than this, Congress have legislated upon the subject, although it was not necessary for them to do so.

"The statute of 1807, ch. 39, provides that, whenever it is lawful for the President to call forth the militia, to suppress an insurrection, he may employ the land and naval forces of the United States for that purpose.

"The authority to use the army and navy is thus expressly confirmed, but the manner in which they are to be used is not prescribed. That is left to the discretion of the President, guided by the usages and principles of civilized war, and these principles and usages undoubtedly authorize the capture of enemy's property at sea.

"What is enemy's property, is a judicial question, to be decided by the prize court; and unless otherwise instructed by their own sovereign, they must be guided by the rules and principles of public law.

"Property may be condemned as hostile without proof of the personal sentiments of the owner being disloyal.

"Acts which tend to subserve the interests of

the enemy, may impress a hostile character upon property, without regard to the political views or wishes of the owner. Residence of the owner in the enemy's country, may be of such a character as to stamp the property conclusively as hostile. How far residence may, in any case, be open to explanation, or the presumption arising therefrom be repelled, I have no occasion to consider. When a hostile character is imputed to property because of the residence of the owner, the court may be compelled to decide whether the place of his residence be enemy's country.

"What shall be deemed enemy's country is sometimes a question of much difficulty. Some nations or tribes can hardly be said to have any country. Such are the nomadic Arabs, and such were the children of Israel during some part, at least, of their migration from Egypt to Palestine. A belligerent nation may invade a neutral province and hold the control of it, and yet the possession be such as not necessarily to impress upon the inhabitants a hostile character. Thus, in the case of *The Gerasimo*, 11 Moore, P. C., 101, it was decided that, although Russia had taken forcible possession of the Danubian Principalities, and for a time held dominion over them, yet, that a ship of a resident of Wallachia was not liable to capture by a British cruiser as enemy's property; the occupation of that province by Russia, being not only forcible, against the will of the inhabitants, but avowedly temporary and for a special purpose. If Wallachia, by its local government, the Hospodar and Divan, had voluntarily joined with Russia, and made common cause in the war against England, the inhabitants would,

unquestionably, have been enemies, and their property on the ocean, lawful prize.

"In cases which may come within the definition of civil war, there may be only an assemblage of individuals, in military array, without political organization or territorial limit; or, armed bands may make hostile incursions into a loyal state, or hold divided, contested, or precarious possession of portions of it, as now in Missouri and Kentucky. In such cases, local residence may not create any presumption of hostility. Far otherwise is it in Virginia. On the 17th day of April, 1861, being immediately after the rebel confederates had attacked and captured Fort Sumter, a convention of delegates, by solemn ordinance, undertook to place all the inhabitants of that state in an attitude of rebellion, and to join the war, which had been previously begun against the United States. The act of rebellion was to take immediate effect, and an alliance making common cause with the Confederate enemy was immediately formed and hostilities actively waged by armies raised within, and invited from without the state. All this was, indeed, subject to be disaffirmed by a vote of the whole people of the state, to be taken on the 23d day of May; but no part of it has been disaffirmed. On the contrary, the popular vote on that day, apparently by a large majority, ratified the proceedings of the convention, the alliance, and the war. The western counties in the state nobly vindicated their honor and their fidelity, by refusing submission to rebel mandates, and adhering to the Union. They did not, indeed, change their domicile, but they removed the power of rebel Virginia from the place

of their domicile. The Virginia rebellion was not the act of individuals asserting that moral right of revolution which belongs to all subjects, but it was the assertion of a pretended state right. It was founded solely on the deadly doctrine of secession, which claims that a state, as an organized political body, may sever itself from the Union. In attempting this, and carrying on the war, it acted by majorities claiming implicit obedience from the minority. The exterior boundaries of the state, and its internal division by counties, have been clearly defined, and the city of Richmond, where these claimants reside, is within the territory over which, by known limits, this political body has, for nine months past, held absolute dominion.

"Such residence subjects both property and person to the absolute control of the enemy, and augments his resources and his strength. And I see no sufficient reason why it is not to be deemed a continued residence in an enemy's country, which subjects property captured on the ocean to condemnation as lawful prize. In this case, it does not appear that the claimants ever had a domicile in any other place than Richmond; nor is there any evidence going to explain their continuance there, or to repel the presumption of hostility arising therefrom.

"It is not necessary therefore, to decide whether such evidence could be admitted, or what would be its effect. In questions so novel, I do not think fit to go farther than the case before me requires.

"But it is objected that the question, what persons or country are to be deemed hostile, is not a judicial one; or rather, that the courts cannot consider any person or country to be hostile, unless the

legislature has previously designated them as such. This is directly met by the case of *The Gerasimo*, 11 Moore, P. C., 101, above cited, in which the sole question was, whether the province of Wallachia was enemy's country so as to subject the property of a resident therein, to capture as prize. This question the High Court of Admiralty decided in the affirmative, and the Privy Council in the negative. Both decisions were founded exclusively upon the character of the Russian occupation, as exhibited by the evidence, the court having no aid or instruction, by any act either of the Queen or the Parliament. The cause was most elaborately discussed, both by the bar and the bench, and yet not a doubt was suggested of the question being strictly judicial.

"This objection, that it does not belong to the court to decide who shall be deemed enemies, or rather, that the court can decide only one way, and that against the captors, unless Congress has previously declared who shall be considered enemies, really carries us back to the questions whether there can be war without a declaration by Congress, and, whether, in civil war, the parent country has full belligerent rights. Those questions have already been considered; and it is believed that such rights exist, and, among them, undoubtedly is that of making maritime captures of enemy's property. And when property is brought in for adjudication, the court must decide whether it be hostile or not; and in doing so, it must, in the absence of legislative instruction, be guided by general principles and usage, under which, one criterion of enemy's property is the residence of the owner. This is a

known and well-established rule of decision, which the court cannot disregard. It is not necessary, however, to determine how the court would deal with these questions, in the absence of any action, by other departments of the government, because there has been such action.

"In addition to other important acts, the President by proclamation of the 27th of April, established a blockade of the ports of Virginia. This was the exercise of a great belligerent right, and could have been done under no other. He could not prohibit or restrict the commerce of any state by a mere municipal regulation. The blockade was avowedly established as a belligerent act under the law of nations; and it was accordingly announced that it would be rendered effective by an adequate naval force; and in all proceedings in relation to it by our own country and other nations, it has been regarded as a belligerent act. Under it, there have been divers captures by our navy, and condemnations by our courts. Now such a blockade could not be valid unless it be of enemy's country.

"Some have thought that it was to be deemed enemy's country, because of the proclamation of the President. It seems to me rather that the proclamation and the blockade are to be upheld as legal and valid, because the territory is that of an enemy. But whichever view is adopted, the result is the same, namely, that the court must regard the country as hostile.

"Richmond, where these claimants reside, is one of the places that was thus blockaded. This is not all. The proclamation of a blockade of Virginia, as hostile territory, and the orders of the President

to the navy, under which captures like the present have been made, have been expressly confirmed by Congress.

"The statute of 6th August last, ch. 63, declares that such acts and orders shall have the same efficacy as if they had been previously authorized by legislative enactments.

"Without going into a discussion of the effect of that confirmation, it is evident that it must have the force of an instruction to prize tribunals, to regard those proceedings of the President as legal and valid.

"It has been urged that in a civil war, it may sometimes be very impolitic to confiscate the property of persons resident in the rebel country; and that the expediency of doing so is a political question to be determined by the legislature.

"We are now dealing only with *maritime* captures. It is true that policy may sometimes require that the property of such residents should be exempted from arrest; and it is quite as certain that sometimes it ought not to be exempted. There should therefore be somewhere lodged a discretionary power, to capture this property or not, as varying circumstances and exigencies may require.

"This power is now vested in the President. He controls the navy, and directs what captures shall be made. He may instruct inferior officers that particular vessels, or those belonging to certain persons, or engaged in a particular trade, are not to be arrested.

"What captures shall be made, like other questions of war policy, may safely be left to the discretion of the commander-in-chief.

"The statute of 1861, ch. 28, has been referred to, as assuming that there are loyal citizens in the rebel states who are to be aided and protected, and it is urged that their property should not be subject to confiscation. That act places two millions of dollars in the hands of the President, to be used at his discretion in arming, organizing, and sustaining loyal citizens in rebel districts. This act undoubtedly contemplates that there may be such loyal citizens, and that it may be expedient so to aid and strengthen them: and it makes an appropriation for that purpose. But it is wisely left to the unrestricted judgment of the President to determine who are such loyal citizens, if any, and to what extent they shall be treated as such.

"It adds to the means of the President, but in no degree detracts from his previous authority, to treat persons or property as he shall deem best.

"It has been contended that the proviso in the 24th section of the crimes act of 1790, ch. 9, should prevent condemnation of this cargo as prize. That act describes certain offences, and prescribes their punishment; and among them is the crime of treason.

"The proviso declares, that no conviction shall work corruption of blood or forfeiture of estate. This shows that the lawgivers thought that death was a sufficient penalty, without confiscation following as a legal consequence of conviction.

"There is an analogous provision in the Constitution (art. 3, § 3), and, as it has embarrassed some minds, it deserves attention.

"In the first place, the objection assumes, that there can be no condemnation unless the claimants

are traitors. This is an error. As already stated, property may be treated as hostile, although the owner has not been guilty of treason. He may be an alien, owing no allegiance; or a citizen, whose opinions or wishes are not proved to be hostile, and yet, he may be so situated, and his property be so used, as to subject it to capture as prize.

"A striking case is to be found in *The Venus*, 8 Cranch, 253. In that case a citizen of the United States, residing at Liverpool, shipped property for New York, on the 4th of July, 1812, having no knowledge of the war, which had been previously declared by the United States. This property was captured by an American privateer, and held by the Supreme Court to be lawful prize. The court, in delivering their opinion, say, that although the claimant, being a citizen of the United States, 'cannot be considered an enemy in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property, concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so.' (See also the cases collected by Sir William Scott, in *The Hoop*, 1 Rob., 196.)

"In the case now before me, it is not contended or offered in proof by either party, that these claimants have been guilty of the crime of treason; and surely the claimants cannot set it up, in argument, as a defence. In the second place, the owner may, by certain acts, have subjected his property to be treated as enemy's, and by other distinct acts, committed the crime of treason; and confiscation may be inflicted for the former, and the penalty of death

for the latter. Just as the same person may be guilty of larceny, and subsequently of murder, and be fined for the first, and afterward convicted of the capital offence.

"Third, suppose there should be but one act, which is such a use of property as subjects it to confiscation, and, at the same time, constitutes an overt act of treason; and suppose further, that the government cannot proceed for both penalties, yet they may elect. They are not bound to prosecute for the crime; and if they enforce the forfeiture, the most that can be contended is, that they are thereby precluded from subsequently having a conviction for the treason.

"The acts passed by Congress last summer have been referred to, as expressing the views of the legislature upon the subject of confiscation in the present war. As they do not reach cases like the present, it is contended that it was the intention of the legislature that such property should not be condemned. It is obvious that, in their general purpose and effect, they were intended to make the prosecution of the war more efficient, to give additional means and power to the President, but in no degree to curtail the authority which he previously possessed. They embrace some cases in which confiscation would not follow from the general law, and render others more definite and certain, and provide new modes of procedure. The belligerent right of capture at sea previously existed, and Congress has left it unimpaired.

"Further still. This right of maritime capture was not only well known, but had actually and notoriously been exercised.

"The last session of Congress closed on the sixth day of August. Prior to that time divers captures had been made of vessels and cargoes belonging to inhabitants of insurgent districts. In particular, *The General Parkhill* was captured on the twelfth day of May, and sent to Philadelphia, and there condemned as enemy's property, at the June term of the District Court. *The Pioneer*, *Crenshaw*, *North Carolina*, and *Hallie Jackson*, were sent into the port of New York in the course of May and June, and the vessels or their cargoes have since been condemned as enemy's property. In this very case of *The Amy Warwick*, the capture was made on the tenth of July, and the libel was filed on the eighteenth of that month. All these captures were made by ships of war, and of course under orders emanating from the President. Yet, so far from discountenancing these proceedings, Congress, as we have already seen, did, by the act of the sixth of August (chap. 63, sec. 3), expressly confirm all orders, respecting the army and navy, which had been made by the President since the fourth of March last.

"The counsel for the claimant has relied upon a recent charge, by Mr. Justice Nelson, to the Grand Jury in the Second Circuit. That learned judge did not enter into any discussion of prize law. The occasion did not call for it. He expressed the opinion, if correctly reported in the newspapers, that loyal citizens of rebel districts were not to be treated as enemies, nor their property confiscated. But he did not undertake to say who were to be deemed loyal citizens, what was to be the evidence of their fidelity, or how the presumptions arising

from continued residence in the enemy's country are to be overcome.

"The counsel for the captors has relied upon a remark made by Judge Dunlop, in the case of *The Tropic Wind*, and upon the learned decisions of Judge Cadwallader, in the case of *The General Parkhill*, and of Judge Betts, in the cases of *The Crenshaw*, *North Carolina*, *Pioneer*, and *Hallie Jackson*. These cases are directly in point, and I might well have rested my decision solely upon the authority of those able and distinguished judges. But as it has been contended that those decisions are not sustained by the authorities which were cited in their support, I have yielded to the earnest invitation of the eminent counsel in this cause, to investigate the principles and authorities which it involves.

"Claim rejected and the property condemned."

At a subsequent period, and in the same case, "*on the claim of Dunlop, Moncure & Co.*," after the doctrines announced in the foregoing opinions of the several District Courts, had undergone elaborate discussion and criticism, as well in the national legislature, as in coördinate and appellate tribunals, the learned judge takes occasion to review his former opinion at great length, and to announce in the following instructive disquisition, that he has "seen no reason to change that opinion:"

"The decrees of the District Courts condemning property as hostile, have been objected to, on the ground that they pronounce the owners to be enemies, when in fact they may be personally loyal. But it is a mistake to suppose that those judgments go beyond the fact of permanent residence, and

assert personal guilt in the owner. This mistake has probably arisen from misapprehending the import of certain language, of frequent recurrence in prize law, such as that property is to be condemned as enemy's, or is to be deemed enemy's, or that it is impressed with a hostile character. These are equivalent expressions. They do not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy. It is quite a mistake to suppose that property is never to be condemned except for personal delinquency of the owner. Even under the municipal law, ships and cargoes are liable to condemnation for the use that has been made of them, where there has been no guilty knowledge or intent on the part of the owner; and in prize law, condemnation is not the infliction of personal punishment on proof of individual guilt, but it is a matter of belligerent policy, to destroy the commerce of the enemy and diminish his resources. This is emphatically set forth in the case of *The Venus* (8 Cranch), where property of a citizen of the United States was condemned by reason of his residence, although, as the Supreme Court expressly declare, there was no personal guilt. The same doctrine is found in many other cases. The objection, when scrutinized, involves a denial of the power of the court to make any condemnation as prize, under the principles and according to the rules of the general law, and the practice of nations; and this is to deny to the United States the exercise of belligerent rights. For there is no right of war more clearly established

or more universally exercised, than that of maritime captures; and no reason can be assigned why the United States should be deprived of the power of exercising this important right in the present war. How far the peculiar circumstances of this, or any other conflict, should induce forbearance, like many other questions of policy, in the conduct of the war, is to be determined by the commander-in-chief or the legislature. It is for them, or one of them, to say what captures should be made, and what cases or classes of cases shall be sent in, and condemnation sought by prosecution. In adjudicating such cases, the courts must be guided and governed by established principles and rules of decision. This is well known to the other departments of the government, and when they send a captured vessel to the court, to be there proceeded against as a prize, they necessarily intend, in the absence of other instructions, that the court shall proceed and decide according to the established rules and principles of prize law. There is no other guide. That the great conflict in which we are now engaged is war, in the legal sense of the term, is shown by the express language of the Constitution in defining the crime of treason; that the United States, in this war, have, on the ocean, all the rights of belligerents, has never been distinctly controverted. To deny it, is to break up the blockade, and every condemnation under it.

"Those who have thought that the courts cannot enforce the belligerent rights of the nation without the action of Congress, should, I think, be satisfied that there has been sufficient legislation. In addition to the statutes passed during the last summer,

and particularly the ratifying act of the fifth of August, which was adverted to in my former opinion, Congress, on the 25th day of March last, passed an act to regulate the mode of procedure in prize cases. The first section relates to the custody and preservation of captured property and the taking of evidence. The second and third sections relate to expenses and the compensation of officers. The fourth section relates to the disposition of prize property after final condemnation. This statute affects only the mode of procedure. It gives no direction as to the principles or doctrines by which the court is to be guided in its adjudications. It does not touch the rule of decision. The title of this statute declares it to be an 'Act for the better administration of the law of prize.' The court then is to administer the law of prize, and that must be the general law as known to the prize tribunals of the civilized world, with such modifications as may be made by our own legislature. But to what cases is this general law of prize to be applied? This question is answered by the fifth section of the statute, which declares that its provisions 'shall apply as well to cases now pending, as to all future cases of maritime captures.' This court is thus expressly directed to administer the prize law in cases now pending, or hereafter to arise in this civil war, as well as in cases of maritime captures in future international wars. No distinction is indicated between these two classes of captures, or in the rules of law which are to be applied to them. Further still: the legislature expressly recognizes the pendency of prize cases. In many of those cases, the only question was, whether property should be con-

demned, by reason of the residence of the owner in the enemy's country. This question has been decided by the District Court of three judicial districts, all concurring in decrees of condemnation. This was well known, and yet Congress, in passing an act for the better administration of the prize law, in cases then pending, or hereafter to arise, does not prescribe any rules of decision, or in any way discountenance those which had been adopted by the courts; this may be deemed an acquiescence in, or a tacit approbation of those rules.

"An objection to the prize decisions of the District Courts, has arisen from an apprehension of radical consequences. It has been supposed that if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a state and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error; a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterward on the ocean, even where the peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. (Wheat. Elements of International Law, 619.) Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war, by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise, during peace, all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty;

they cannot be belligerents. Conquest of a foreign country, gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation, by force of arms, expels or overthrows the enemy, and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. (Wheat. Elements of International Law, 616.) During the war of 1812, the British took possession of Castine, and held exclusive and unlimited control over it, as conquered territory. So complete was the alienation, that the Supreme Court held that goods imported into it were not brought into the United States, so as to be subject to import duties. (*United States* vs. *Rice*, 4 Wheat., 246.) Castine was restored to us under the treaty of peace, but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, none would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all preëxisting political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion, and restoring peace in any state, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous

sovereign rights under the Constitution. In a civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any state under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a state have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war is waged to maintain the government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark, that I do not mean that the restoration of peace will preclude the government from enforcing any municipal law, or from punishing any offence against previous standing laws.

"Another objection to those decisions of the District Courts is founded upon the apprehension that they may lead to, or countenance, cruel and impolitic confiscations of private property found on land. This apprehension is unfounded. No such consequence can legitimately follow. Those decisions undoubtedly assert that the United States have the rights of a belligerent. But the extent of those rights on land, or the manner in which they are to be exercised, was not discussed. They were not even adverted to, except to say that enemy's property found by a belligerent on land, *within his own*

country, on the breaking out of a war, will not be condemned by the courts, although it would be, if found at sea. This distinction, so far as it goes, tends to show that the doctrine of maritime captures is not to be applied to seizures on land. But the danger upon which this objection is founded does not arise from the administration of the prize laws by the courts, or the exercise of belligerent rights by military commanders upon military exigencies. The objection really arises from fear of the legislation of Congress. It is apprehended that they may pass sweeping or general acts of confiscation, to take practical effect only after the rebellion shall have been suppressed; that whole estates real and personal, which have not been siezed during the war, may be taken and confiscated, upon coming within reach of the government, after hostilities shall have ceased. This, as we have seen, would not be the exercise of belligerent rights, the war being at an end. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative. If possession be acquired by or after the peace, then previous legislation may take effect, but it will be by the right of sovereignty, not as an act of war. Under despotic governments, the power of municipal confiscation may be unlimited, but under our government, the right of sovereignty over any portion of a state, is given and limited by the Constitution, and will be the same after the war as it was before. When the United States take possession of any rebel district, they acquire no new title, but merely vindicate that

which previously existed, and are to do only what is necessary for that purpose. Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt. What offences shall be created, and what penalties affixed, must be left to the justice and wisdom of Congress, within the limits prescribed by the Constitution. Such penal enactments have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea during the war."

"I have thus noticed the objections which have been made to the former opinion of the court so far as they have come to my knowledge. They do not seem to be well founded."

The claimants, in several of the cases of largest pecuniary importance, and involving the great fundamental questions discussed and determined in the foregoing adjudications, have appealed from the decrees of condemnation.

These appeals, or some of them, having been heard in the Circuit Court of the United States for the circuit in which the district of adjudication is included, and the decrees having been affirmed therein *pro forma*, or upon deliberation, the cases are now pending upon further appeal, in the Supreme Court of the United States.

Their early discussion, upon the final appeals, is confidently anticipated; and the judicial determination of these momentous questions, by this august

tribunal of the last resort, will be looked for by the profession and the community with an interest more deep and absorbing than has attached to any questions submitted to the arbitrament of the judicial power since the formation of the Constitution.

CHAPTER III.

Of the Rights of Belligerents to Interfere with the Commerce, and to Capture and Confiscate the Property of other than Adverse Belligerents—and herein what Constitutes Hostility of Character, both as regards Person and Property.

We have said that from the established principle in the law of nations which recognizes the identity between the wealth of the nation and that of the aggregation of individuals composing the nation, many important rights accrue to the citizen in time of war, to enable him to indemnify his own or the state's injuries, by capture and reprisals of the property of the enemy. Before considering the subject of reprisals, captures, and confiscation, it is important to determine who are, in legal intendment, alien enemies, and who are clothed with that hostile character as to subject their property to seizure and confiscation as lawful prize; and also who are to be regarded as possessing the character of lawful belligerents, with the rights of such at the hands of neutral nations.

Alien enemy defined.

An alien enemy is one who is under the allegiance of a government at war with our own.

Where the allegiance due is of that permanent character which attaches to the citizen or subject, as such, there is no difficulty in determining his position and liabilities. His hostility is coeval with, and as permanent as, his allegiance. It begins with

the commencement of his country's quarrel, and ends only with its termination.

But there are those who are clothed with such character of hostility as subjects them and their property to all the liabilities and forfeitures to which that of permanent alien enemies are subject, and yet do not owe permanent allegiance to the nation at war with us—and it is important to consider the several and various circumstances, of more or less complication, which occasion and determine such a hostile character.

Hostile character cast upon persons who are not alien enemies.

Hostile character may be cast upon a person by his ownership of soil in the enemy's country, so far as to subject the productions of that soil to seizure as lawful prize.

"It cannot be doubted," says Lord Stowell, "that there are transactions so radically and fundamentally national, as to impress the national character, independent of peace or war, or the local residence of the parties."

Impressed upon property

"The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation."[1]

In another case, the same learned judge says: "Certainly nothing can be more decided and fixed than the principle of this court and of the Supreme

[1] *The Vrow Anna Catharina*, 5 Rob., 161.

Ownership of soil.

Court, upon every solemn argument there, that the possession of the soil does impress upon the owner the character of the country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made on the point of law at this day.

"First, then, it appears that the produce of the hostile soil is to be considered as bearing a hostile character; and certainly, if any property ought to be considered as bearing such a character at all, for purposes of seizure, nothing can be more reasonable than that the products of the enemy's land, one of the greatest sources, and as some have supposed, the sole source of national wealth, should be regarded as legitimate prize. That the interests of friends may sometimes be involved in our vengeance upon enemies, is a matter which it is natural to regret, but impossible to avoid. The administration of public rules admits of no private exception, and he who clings to the profits of a hostile connection, must be content to bear its losses also. Secondly, it will be found that a settlement in a hostile jurisdiction, whether it be by residence, or merely by the maintenance of a commercial establishment, impresses on the person so settling, the character of the enemies among whom he settles, in regard to such of his commercial transactions as are connected with that settlement.

Residence in a hostile jurisdiction.

Uniformity of rule as to impression of hostile character.

"The American jurists and courts have repeatedly recognized the rule as a reasonable and just one to be acceded to by all maritime nations."[1]

[1] Kent's Com. I., 82; *Bentzon* vs. *Bogle*, 9 Cranch, 191; *The Ann Greene*, 1 Gall., 284; *The Venus*, 8 Cranch, 253.

The ship *President* was captured by an English privateer, on a voyage to Europe from the Cape of Good Hope, then in possession of Holland, with whom Great Britain was at war. A claim was filed on behalf of Mr. J. Emslie, as a citizen of the United States. It appeared that he was born in Britain, but had settled at the Cape of Good Hope during the preceding war, and had been employed there as American consul. In pronouncing the decree of the court in this case, Lord Stowell said: "The court must, I think, surrender every principle on which it has acted, in considering the question of national character, if it were to restore this vessel. The claimant is described to have been, for many years, settled at the Cape, with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country."[1]

During the last war between Great Britain and Holland, there seems to have been a very general misapprehension among the merchants of the United States, that they were entitled to retain all the privileges of American citizens, without regard to the fact of their residence and occupation in another country. Numerous decisions of the English courts corrected this error, to the not inconsiderable cost of those who had unhappily fallen into it. A ship was captured on a voyage from Curaçoa, then a Dutch possession, and claimed in the English court, where she was libeled as prize, by one who was first described as an American merchant, but who, upon further proof being required by the

[1] *The President*, 5 Rob., 277.

court, was ascertained and described to be a person having a house of trade and actually residing at Curaçoa. The ship was condemned as lawful prize; —Lord Stowell declaring: "The claimant is undoubtedly to be considered an enemy at the commencement of the transaction, Holland being, at that period of time, the enemy of this country."[1]

"No position," said Lord Stowell, in another case, "is more established, than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered a member of that country."[2]

In this last case, a cargo which belonged to Mr. Millar, an American consul resident at Calcutta, and which had been taken in trade with the enemy, was condemned as the property of a British merchant resident at Calcutta, and engaged in illegal commerce.

"It is said to be hard," said Lord Stowell, "that Mr. Millar should incur the disabilities of a British subject, at the same time that he receives no advantages from that character; but I cannot concede to that representation, because he is in the actual receipt of the benefit of protection for his person and commerce from British arms and British laws—under an existing British administration in the country;—he may be subject to some limitations of commerce incident to such establishments, which would not occur in Europe, but he must take his situation with all its duties, and among those, the duty of not trading with the enemies of this country."

[1] *The Anna Catherina*, 4 Rob., 107.
[2] *The Indian Chief*, 3 Rob., 12.

The common law courts of England have recognized and applied the same doctrine.[1] Rule applied in common law courts.

In the United States, this principle seems to have been very fully established by numerous decisions.

Chancellor Kent says: "This principle, that, for all commercial purposes, the domicil of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. If he reside in a belligerent country, his property is as liable to be captured as enemy's property; as, if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences of the neutral trade. The general rule is, that a person living *bona fide* in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, provided it is not inconsistent with his native allegiance.[2]

In a case which was determined in the House of Lords, in 1802, the same principle seems to have been established, even beyond the reservation of a native allegiance.[3] In this case, a British-born subject, resident at the English factory at Lisbon, was accorded the privilege of a Portuguese character, so far as to render his trade with Holland (then at war with England, but not with Portugal) unimpeachable as illicit trade.

There is, indeed, one case at law in the English courts,[4] in which the question was involved, and in

[1] *McConnel* vs. *Hector*, 2 Bos. & Pul., 113; *De Laneville* vs. *Phillips*, 2 New Rep., 97.

[2] Kent's Com., I., 83; *The Emanuel*, 1 Rob., 296.

[3] *The Danous*, 4 Rob., 255.

[4] *Melton* vs. *De Mello*, 2 East., 234; 2 Camp., 420.

which Lord Ellenborough takes no notice of the preceding decisions; but the observations of his lordship in that case, cannot be regarded as at all equivalent to a denial of the doctrine, and the more especially as he advises that the plaintiff go back to the Court of Admiralty, and have the matter set right there. In a subsequent case at law, the rule was applied to a natural-born subject of Great Britain, domiciliated in the United States, and it was determined that he might lawfully trade to a country at war with England but at peace with the United States.[1]

In this connection, the most important question for determination is, what constitutes residence. This would, at first, appear to be a question of very simple solution, but it has been complicated by the subtleties of merchants, to such an extent as to have occasioned much discussion and given rise to several direct decisions.

The citizen or subject of one nation may, by his employment and residence in another, acquire a new national character for commercial purposes—although he may not thereby divest himself of his national character for political purposes. His allegiance is still due to the country of his birth; such a person residing in a neutral state is at liberty to trade with the enemies of his country in all articles except such as are contraband—a trade in such would be in violation of his allegiance.[2]

What constitutes a residence in a hostile country.

As to the question, what constitutes such a residence as fixes upon the party a hostile character towards that state with which the country of his

[1] *Bell* vs. *Reid*, M. & S., 726.

[2] *The Ann*, Dodson, 222.

residence is at war, it appears to be conceded that the first point for determination is, the true intent of the party—is it or not a residence with the intention of remaining? "I do not," says Lord Stowell in an early case, "mean to lay down so harsh a rule, as that two voyages from France should make a man a Frenchman—but the claimant appears to have had a continuous residence there during the interval of his voyages, and to have had that residence also with the intention of remaining."[1] In that case, the *animus manendi* was evidently regarded by the court as the prominent point to be settled, in determining the question of residence to fix a hostile character.

tile country to impress a hostile character.

In another case,[2] the same learned judge discusses the question at much length, and says: "Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil—I think that hardly enough is attributed to its effects. In most cases, it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy—for if the purpose be of a nature that may *probably*, or does actually, detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a law-

[1] *The Bernon*, 1 Rob., 162. [2] *The Harmony*, 2 Rob., 324.

suit. It may happen, and indeed is often used, as a ground of vulgar and unfounded reproach (unfounded as matter of reproach, though the fact may be true) on the laws of this country—that it may last as long as himself. Some suits are famous in our juridical history for having outlived generations of suitors. I cannot but think, that against such a long residence, the plea of an original special purpose could not be averred. It must be inferred, in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war, it is certainly reasonable, not to bind him too soon, to an acquired character, and to allow him a fair time to disengage himself—but if he continues to reside during a good part of the war, contributing by payment of taxes, and other means, to the strength of that country, I am of opinion that he could not plead his special purpose, with any effect, against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original and sole purposes of a long continued residence. There is a time which will estop such a plea. No rule can fix the term *a priori*—but such a time there *must* be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicil in a certain space of time, would nevertheless have that effect, if distributed over a larger time. Suppose an American comes to Europe with six contemporary

cargoes, of which he had the present care and management, meaning to return to America immediately—they would form a different case from that of the same American coming to any particular country of Europe, with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter. It is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil."

But if the *animus manendi* be proved *aliunde*, the time of the residence becomes of no moment in the determination of the question of hostile character.

In another case,[1] Lord Stowell observed: "Proof of mere recency of establishment, will avail nothing, if the intention of making a permanent residence there, was fully fixed upon the party."

In cases where it is shown that there was really no intention of remaining, but on the contrary a frustrated intention of departing, the abode is not considered as a residence to any hostile purpose.

A British-born subject had been settled as a merchant at Flushing, in Holland, but upon the apparent approach of hostilities between that country and Great Britain, he adopted measures for his removal and return to England. In July, 1803, as it appeared in proof, he actually effected his escape and returned to England. He had dissolved his

[1] *The Diana*, 5 Rob., 60.

commercial partnership in Holland, and had in truth only continued to reside there after the war, by reason of the unwarrantable detention by the government of Holland, of Englishmen found there at the breaking out of hostilities.[1] "Under these circumstances," says Lord Stowell, "it would, I think, be going farther than the principle of law requires, to conclude this person by his former occupation, and by his constrained residence, so as not to admit him to have taken himself out of the effect of intervening hostilities by the means which he had used for his removal."

This doctrine is very clearly recognized, though incidentally passed upon, by Lord Ellenborough, in two cases subsequently decided by him.[2]

It is obvious that it should require fewer circumstances to constitute the domicil or residence of which we are treating, in the case of a native citizen, than to impress the national character, by that means, upon one who is originally of another country.

M. Lappiere was by birth a Frenchman, and present in a French colony where he shipped goods for France. The goods were captured, and he made claim as a merchant of America, where he had a permanent residence before his coming to the French colony. Lord Stowell said: "If it could be inferred that he had been originally a French merchant, and was, at the time of his shipment, resident in St. Domingo, and shipping to old France, I should have hesitation in considering him a Frenchman. Had

[1] *The Ocean*, 5 Rob., 90.

[2] *Bromley* vs. *Hazeltine*, 1 Camp., 6; *O'Mealy* vs. *Wilson*, ib., 482.

the shipment been made from America, his asserted place of abode, it might have been a circumstance to set in opposition to his present residence, and might afford a presumption that he was in St. Domingo only for temporary purposes. But this is a shipment to France from a French colony, and, if the person is to be taken as a native of France, the presumption would be that he had returned to his native character of a French merchant."[1]

A native-born citizen of the United States, before a declaration of war, emigrated to a neutral country, and there acquired a domicil. Afterwards, and during the continuance of the war, he returned to the United States and reacquired his native domicil. It was held that he had become a redintegrated American citizen, and could not afterwards, *flagrante bello*, acquire a neutral domicil by again emigrating to his adopted country.[2]

Where the residence is a voluntary one, and entirely unrestrained, whether it be literal and actual, or only a residence by implication, it is considered, ordinarily, as a complete commercial residence. In the celebrated case already cited,[3] it was objected against the right of the captors that the residence of an American in Calcutta was not a residence among British belligerents; that the Mogul, having the imperial rights of Bengal, the king of Great Britain does not hold the British possessions in the East Indies in the right of the sovereignty, and that therefore the character of British merchants does

[1] *The Virginie*, 5 Rob., 98.

[2] *The Dos Hermanos*, 2 Wheat., 76; *The Ann Greene*, 1 Gall., 284.

[3] *Th Indian Chief*, 3 Rob., 12.

not necessarily attach on foreigners, locally resident there. This objection was thus disposed of by Lord Stowell:

"Taking it that such a paramount sovereignty on the part of the Mogul princes really and solidly exists, and that Great Britain cannot be deemed to possess a sovereign right there, still it is to be remembered that, wherever a mere factory is founded in the eastern part of the world, European persons, trading under the shade and protection of those establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe, and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident, and this distinction arises from the nature and habits of the countries. In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up, foreigners are not admitted into the general body and mass of the nation. They continue strangers and sojourners, as their fathers were, not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on

their trade. With respect to establishments in Turkey, it was declared in the case of Mr. Fremeaux, in the last war, that a merchant carrying on trade at Smyrna, under the protection of the Dutch consul at Smyrna, was to be considered as a Dutchman, and in that case the ship and goods belonging to Mr. Fremeaux, being taken after the order of reprisals against Holland, were condemned as Dutch property. So in China, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character, and not being admitted to assume the character of the country, they are considered only in the character of that association or factory.

"I remember perfectly well, in the case of Mr. Constant de Rubecque, it was the opinion of the Lords, that although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a Frenchman.

"I am, however, inclined to think that these considerations are unnecessary, because, though the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists, otherwise than as a phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high, or, as I might almost say, this empyrean sovereignty of the Mogul, is sometimes brought down from the clouds, as it were, for purposes of policy, it by no means interferes with that actual authority

which this country, and the East India Company —a creature of this country—exercise there with full effect. The law of treason, I apprehend, would apply to Europeans living there, in full force. It is nothing to say that some particular parts of our civil code are not applicable to the religious or civil habits of the Mahomedan or Hindoo natives, and that they are, on that account, allowed to remain under their own laws. I say this is no exception; for with respect to internal regulations, there is, amongst ourselves in this country, a peculiar sect —the Jews—that, in matters of legitimacy, and on other important subjects, are governed by their own particular regulations, and not by all the municipal laws of this country, some of which are totally inapplicable to them. It is, besides, observable that our own acts of Parliament, and our public treaties, have been by no means scrupulous, in later times, in describing the country in question as the territory of Great Britain.

"In the American treaty, the particular expression occurs, that the citizens of America shall be admitted and hospitably received in all the seaports and harbors of the British territories in India. The late case in the Court of King's Bench (*Wilson* vs. *Marryat*, 8 Term R., and 1 Bos. and Pul., 430), arising upon the interpretation of that treaty, and in which it appears to have been the inclination of that court to hold our possessions in India to come within the operation of the navigation acts, gave occasion to an act of Parliament in which the term British territory is borrowed from the treaty.

"There is, likewise, a general act of 37 Geo. III. c. 117, for the allowance of neutral traders in India,

which expressly uses the same term, reciting that it is expedient that the ships and vessels of countries and states in amity with his majesty, should be allowed to import goods and commodities into, and export the same from, the British territories in India. It is, besides, an obvious question, to whom are the credentials of this gentleman, as consul, addressed? Certainly to the British government; to the East India Company, and not to the Great Mogul. What is the condition of a foreign merchant residing there? From attention to the argument of a gentleman whose researches have been particularly turned to subjects connected with the East, I have made inquiry of a person of the greatest authority on such a subject, who is just returned from the highest judicial situation in that country, and the result is, as on general principles I should certainly have expected—that a foreign merchant resident there, is just in the same situation as a British merchant, subject to the same obligations, bound to the same duties, and amenable to the same common authority of British tribunals."

Periodical absence, on professional or other avocations, will not divest a person of that national character communicated to him by his residence, if that residence be fixed, with the voluntary intention of remaining.[1]

Nor, on the other hand, can a merchant, who has a fixed residence, and is carrying on business at the place of his birth, acquire a foreign commercial character by occasional visits to a foreign country.[2]

[1] *The Junge Ruiter*, 1 Acton, 116.

[2] *The Nereide*, 9 Cranch, 388.

Personal residence not requisite.

In order to clothe a person with a national character, for commercial purposes, an actual personal residence in the hostile or neutral country, is by no means an overruling necessity.

Established agency sufficient.

It is undoubtedly true, that a merchant, engaged in trade with a foreign country, and while residing in his own, carries on his transactions by means of a resident agent in the foreign country, does not thereby, necessarily, and as a rule, acquire the character of the nation of his agent's residence. But where the employment of the agent is in that peculiar service, as to imply that the employer considers himself as virtually a resident of the country, in other words, where the agent, instead of acting as the mere business representative, the factor or attorney of his employer, acts as his deputy, in such cases the employer would undoubtedly be considered as having taken upon himself the national character of the country of such an agent's residence.

Hostile character impressed by character of the trade.

A contract was made with a hostile government, and one which was endowed with such peculiar privileges as to give to the contractors, who were neutrals, even greater advantages than they would have enjoyed had they been Spanish merchants—Spain being the hostile contracting government. For the purpose of executing this contract, the merchant contractors thought fit to commission a special agent to reside in the hostile territory. The question was, the effect of such residence by such an agent, upon the national character of the principals; and upon this question Lord Stowell thus speaks in his judgment:

"It is not indeed held, in general cases, that a

neutral merchant, trading in an ordinary manner to the country of a belligerent, does contract the character of a person domiciled there, by the mere residence of a stationed agent, because, in general cases, the effect of such a residence is counteracted by the nature of the trade and the neutral character of the British merchant himself.

"But it may be very different where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There, the nature of his trade does not protect him; on the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it."[1]

Doctrine of the United States Courts

This same principle is fully recognized by the decisions of the courts of the United States. And without resort to a solution of the question of national domicil, if one embarks in the ordinary or extraordinary commerce of an enemy's country, upon the same footing and with like advantages as a native resident citizen—*the property* employed by him in that commerce is held to be incorporated into the general commerce of the enemy's country, and subject to confiscation as lawful prize—be the residence of the merchant actual or implied, where it may.[2] In the same case, it was determined, that a shipment made by a house in the enemy's country on account and risk of an exclusively neutral partner or house, there being every evidence of good faith in the transaction, was not subject to confiscation as prize of war, and equally correct would be

[1] *The Anna Catherina*, 4 Rob., 107.

[2] *San Jose Indiano*, 2 Gall., 268.

the application of the principle under converse circumstances—that is, a shipment made by a partner or agent domiciled in a foreign country, to a *bona fide* neutral house or principal, on the exclusive account of the latter.

Residence by implication from nature of the office.

A person holding the office of consul in a foreign state, as we have seen in the case of *The Indian Chief*, before cited, is deemed a resident of that state where his official commission implies a residence. This has been held to be true even where there is no actual residence there by the consul, but his duties are performed there by deputies of his appointment—the appointment of deputies being considered proof that he regards himself as retaining the office to which this implied residence attaches, though he may have found it convenient to avoid the personal burden of its functions. In a case before cited, in another connection,[1] the claimant represented himself as an American, but in his affidavit stated that the United States government had appointed him consul-general to Scotland, although he had acted no farther in that capacity than to appoint deputies.

Lord Stowell said: "It will be a strong circumstance to affect him with a British residence, as long as there are persons acting in an official station here, and deriving their authority from him."

Importance of the *animus manendi* in determining residence.

But, as has been repeatedly affirmed, the *animus manendi* is the decisive proof of residence. To establish this intention of the mind, the circumstances in evidence need not be numerous, nor of a public

[1] *The Dree Gebroeders*, 4 Rob., 232; *Vide The Endraught*, 1 Rob., 21.

or notorious character. In one case, the claimant urged against the presumption by the proof of his residence in a hostile country, that he had no fixed counting-house there. But Lord Stowell said, "that he had no fixed counting-house in the enemy's country, will not be decisive. How much of the great mercantile concerns of this country is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is, indeed, a vain idea, that a counting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself, and acts as a merchant of that place, it is sufficient, and the mere want of a fixed counting-house there, will be no breach in the mercantile character, which may well exist without it."[1]

Hostile character impressed by peculiar character of traffic.

Another principle upon the subject of hostile character for commercial purposes has been established by numerous authorities. It is nearly connected with the question of residence, but results from the peculiar character of the commerce or traffic engaged in. In an early case, it was declared by Lord Stowell, to be "a doctrine supported by strong principles of equity and propriety, that there is a traffic which stamps a national character in the individual, independent of that character which mere personal residence may give—and it was laid down in the case of the 'Nancy and other ships,' which was heard before the Lords, on the 9th of April, 1798, that if a person entered into a house of trade in the enemy's country, in time of war, or

[1] *The Jonge Klassina*, 5 Rob., 297.

continued that connection during the war, he should not protect himself by mere residence in a neutral country."[1]

The maintenance of a commercial house or establishment in a hostile country, either personally or by agent, impresses the person with a hostile character, with reference to so much of the commerce as is connected with that establishment.

The citizen or subject of a belligerent, residing or maintaining a commercial house in the country of the adverse belligerent, is deemed as possessed of a hostile character, so far as to subject to seizure such of his property as is concerned in the commerce of his foreign establishment.

So, too, the citizen of a neutral nation, residing or maintaining a commercial establishment in the territory of a belligerent, is deemed as possessed of a hostile character towards the other belligerent, so far as to justify the seizure of his property that is connected with his commerce in the belligerent nation. And a citizen of a belligerent state, residing or maintaining a commercial establishment in a neutral state—is deemed a neutral, both by his native country and by the adverse belligerent—and with reference alike to the trade carried on by him with the adverse belligerent, and with all the rest of the world.

The residence only affects the particular trade. As was said by Lord Stowell in a case before cited:[2] "A man having mercantile concerns in two countries, and acting as a merchant of both, must

[1] *The Vigilantia*, 1 Rob., 13.

[2] *The Jonge Klassina*, 5 Rob., 297.

be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries."

And the same learned judge, in another case[1] says: "The personal domicil of the claimant, is at Embden, where he resides, and has a house of trade. He is only connected with this country by his partnership in a house here, which is to be taken in a manner, as collateral and secondary to this house at Embden. That he may carry on trade with the enemy at his house in Embden cannot be denied, provided it does not originate from his house in London, nor vest an interest in that house."

In another case, the distinction is very clearly drawn between that trade, as affected with liability to capture and forfeiture, which a merchant may carry on at his hostile, and that which he may carry on at his neutral establishment.

In this case,[2] the claimant resided in a neutral country, but had two commercial establishments, one in a neutral country, and the other at Ostend, in a hostile country.

In disposing of this case, in which there were nine other ships involved, besides the *Portland*, Lord Stowell observes: "As to the circumstance of his being engaged in trading with Ostend, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at Hamburgh, and having no connection with Ostend, because, call it what you please, a colorable character as to the trade carried on at Ostend, I cannot think it will give

[1] *The Herman*, 4 Rob., 228. [2] *The Portland*, 3 Rob., 41.

such a color to his other commerce, as to make that liable for the frauds of his Ostend trade. As far as the person is concerned, there is a neutral residence. As far as the commerce is concerned, the nature of the transaction and destination are perfectly neutral, unless it can be said, that trading in an enemy's commerce, makes a man, as to all his concerns, an enemy—or, that being engaged in a house of trade in the enemy's country, would give a general character to all his transactions. I do not see how the consequences of Mr. Ostermeyer's trading to Ostend can affect his commerce in other parts of the world. I know of no case, nor of any principle, that would support such a position as this—that a man, having a house of trade in an enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicil."

Residence of owner determining national character of a ship as general rule.

The national character of a ship is, in general, determined by the residence of her owner. There may, however, be circumstances connected with the particular or special conduct of the ship which will vary the presumption of character arising from residence.

Ship considered of the nation whose flag or pass she bears, as to liability to capture.

If a ship, of whatever nation as to her owner's residence, is navigating the seas under a pass of a foreign nation, she is regarded to all intents, so far as liability to capture is concerned, as a ship of that nation.

Sometimes the national character of vessel

Upon the same principle, if a ship be purchased by a neutral in the country of the enemy, and is

employed subsequently and habitually in the trade of that country, commencing with the war, continuing during the war, and on account of the war, she is to be deemed, notwithstanding a *bona fide* change of ownership, a ship of the country where she is thus employed. is determined by its employment.

In pronouncing judgment of condemnation in the case of *The Vigilantia*, before cited,[1] Lord Stowell says: "Here is a Dutch built vessel—a Dutch fishing vessel—that went from Amsterdam regularly and habitually to Greenland, and to return to Amsterdam, there to deliver her cargo. She is purchased in Holland. She is purchased avowedly for the purpose of pursuing the same course of commerce—the fishing trade of Holland. She is purchased at a time when it is said there was a defect of conveniences for carrying on this trade at Embden. But I am satisfied it was the intention of the parties to carry on this trade to and from Amsterdam. Now, I ask, upon what ground is it that this vessel, so purchased, and so employed, is to be considered merely as a Prussian vessel? Here is a ship as thoroughly engaged and incorporated in Dutch commerce as a ship possibly can be. She is fitted out uniformly from Amsterdam. She is fitted out with Dutch manufacture. She is fitted out for Dutch importation, *in all respects employing and feeding the industry of that country.* She is managed by a Dutch ship's husband, and finding occupation for the commercial knowledge and industry of the subjects of that country. She is commanded by a Dutch captain; she is manned by a Dutch

1 Rob. 1.

crew, and brings back the produce of her voyage for Dutch consumption and Dutch revenue. If to this you add that the vessel is transferred by the Dutch, because they themselves are unable to carry on the trade avowedly in their own persons, it is truly a Dutch commerce in a very eminent degree, not only in its essence, but for the very hostile purpose of rescuing and protecting the Dutch from the naval superiority of their British enemy.

"There had been a determination last war, in the case of two persons, one resident at St. Eustatius, and the other in Denmark, who were partners in a house of trade at St. Eustatius. The one who resided there, forwarded the cargoes to Europe; the other received them at Amsterdam, disposed of them there, and then returned to Denmark. It was decided, in that case, that the share of the person resident in St. Eustatius was liable to condemnation as the property of a domiciled Dutchman, and that the share of the other partner should be restored as the property of a neutral. (*The Jacobus Johannes.* House of Lords, Feb. 10, 1785.)

"There was also a case in this war of some persons who migrated from Nantucket to France, and there carried on a fishery very beneficial to the French. In that case, the property of a partner domiciled in France was condemned, whilst the property of another partner, resident in America, was restored. From these two cases a notion had been adopted, that the domicil of the parties was that alone to which the court had a right to resort; but the case of *Coopman*, House of Lords, April 9, 1798, was lately decided on very different principles. It was there said by the Lords that the former cases were

cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce, and that it would press too heavily on neutrals to say that, immediately on the first breaking out of a war, their goods should become subject to confiscation; but it was then expressly laid down, that if a person entered into a house of trade, in the enemy's country, in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country.

"That decision instructs me in this doctrine—a doctrine supported by strong principles of equity and propriety—that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him."

Hostile character impressed by engagement in commerce ordinarily confined to the adverse belligerent.

There is still another mode in which a hostile character may be imparted to the person, so as to subject his property to capture, and that is, by a commerce of that peculiar character as may be regarded to be confined to the subjects of the adverse belligerents themselves.

The case illustrating this point, is *The Princessa*,[1] The facts in this case are stated by the learned judge in his decision. Lord Stowell says: "This is a Spanish frigate, employed as a packet of the king of Spain, to bring bullion and specie from South America to old Spain; and I think the presumption is most strong, that none but Spanish sub-

[1] 2 Rob., 49.

jects are entitled to the privilege of having money brought from that colony to Spain. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of Spaniards. Therefore, it appears that this is not an ordinary trade; and I must take this to be property which must have been considered as Spanish, and which could not have been exported in any other character.

"It has been decided by the Lords, in several cases, that the property of British merchants, even shipped before the war, yet, if in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects, as that no foreign name could appear in it, must take the consequences of that character, and be considered as Spanish property."

Especially when by authority of adverse government.

One who is specially authorized by the government of the enemy to engage, and, pursuant to such authority, does engage in commercial transactions which are, as a general thing, confined to the citizens or subjects of the enemy, must of necessity be regarded as an enemy, is fully established in the case of the *Anna Catherina*, which has been already cited in another connection. Upon this particular subject, in that case, the learned judge says: "It is by nothing peculiar in his own character, that the original contractor would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and accept those benefits, they take their share also in the legal effects. They accepted his privileges; they adopted his resident agent. It would be monstrous to say that the effect of the original contract

is to give the Spanish character to the contracting person, but that he may dole it out to a hundred other persons, who, in their respective portions, are to have the benefit, but are not liable to the effect of any such imputations. The consequence would be, that such a contract would be protected in the only mode in which it could be carried into effect; for a contract of such extent must be distributed, and if every subordinate person is protected, then here is a contract which concludes the original undertaker of the whole, but in no degree affects one of those persons who carry that whole into execution. On these grounds, I am of opinion that these goods are liable to be considered as the property of the Spanish government: and further, that these parties are liable to be considered as clothed in this transaction, with the character of Spanish merchants."

Character of flag impresses the vessel.

There is another principle which has become established by the authorities of the courts, by which a hostile character is impressed upon property, by virtue of the character of its employment, irrespective of the actual or even the implied or constructive domicil of the owner. It refers to ships or vessels which navigate the ocean under the flag, or the pass, or protection of the enemy.

The case which illustrates this principle most directly, is that of *The Elizabeth*,[1] in which Lord Stowell says: "By the established rules of law, it has been decided that a vessel sailing under the colors and pass of a nation, is to be considered

[1] *The Elizabeth*, 5 Rob., 2.

clothed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognized in the case of a ship taken on a voyage from Surinam to Amsterdam, and documented as a Dutch ship. Claims were given for specific shares on behalf of persons residing in Switzerland, and one claim was on behalf of a lady to whom a share had devolved by inheritance, whether during hostilities or no, I do not accurately remember; but if it was so, she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held that the fact of sailing under the Dutch flag and pass, was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching to it."

To this case of *The Elizabeth*, the reporter, Dr. Robinson, has appended a note, embracing a report of the case of the "*Vreede Schottys*," in which the distinction intimated by the learned judge in the case of *The Elizabeth*, as to hostility of character, between ships and their cargoes, is clearly set forth as follows: "A great distinction has always been

made by the nations of Europe between ships and goods. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but this country has never carried the principle to that extent. It holds the ship bound by the character imposed upon it by the authority of the government, from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered."

The doctrine, that a ship sailing under the flag and documentary protection of the enemy, clothes her with a hostile character, has been recognized and applied with exceeding strictness by the federal courts of the United States. Indeed the principle, as established by these decisions goes to the extent of declaring, that sailing under the license and protection of the enemy, in furtherance of his views and interests, is, without reference to the purpose of the voyage or its destination, such an illegality as subjected both ship and cargo to seizure and condemnation as lawful prize of war.

Reason of the rule.

The basis of these decisions is, that the license granted by the enemy is equivalent to a contract by the licensee, to withdraw himself entirely from the war and enjoy the repose and blessings of peace.

The illegality of such an intercourse for such a purpose is strongly condemned, and it was held, that the moment a vessel sailed on her voyage with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away, even by the termina-

tion of the voyage, but that the vessel and cargo might be seized after arrival in a port of the United States, and condemned as lawful prize.[1]

Attempts to evade the rules which impress hostility of character upon persons or property.

Attempts have been made from time to time, and the ingenuity of merchants has been exercised to elude the application of the principle which impresses property, whether vessel or cargo, with a hostile character, making it subject to confiscation —by reason of the actual or constructive residence of the owner, or of the peculiar character or mode or manner of its employment.

Transfer *in transitu.*

The transfer of the property while in transit has been frequently resorted to, in the hope of accomplishing the purpose; but the rule has become settled by numerous decisions, that property stamped with a hostile character at the commencement of the voyage, cannot change its character by a mere change of ownership while *in transitu.*

The remarks of Lord Stowell, in a case in which the transfer was held to be valid, because actually made by delivery of bill of sale, though not of the property itself, prior to the commencement of hostilities, contain a lucid statement of the rule: "The first objection that has been taken is, that the transfer is invalid, and cannot be set up in a prize court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained, there would be an end to the question; because it has been admitted that these wines were shipped as

[1] *The Julia*, 1 Gall., 605; 8 Cranch, 181; *The Aurora*, ib., 203; *The Hiram*, ib., 444; *The Ariadne*, 2 Wheat., 100.

Spanish property, and that Spanish property has now become liable to condemnation. But I apprehend it is a position that cannot be maintained in that extent. In the ordinary course of things, in time of peace—for it is not denied that such a contract may be made and effectually made according to the usage of merchants in time of war—such a transfer *in transitu* might certainly be made. It has even been contended that a delivery of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery—but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties and all others, cannot be doubted. When war intervenes, another rule is set up in admiralty which interferes with the ordinary practice.

"In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery. This arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognize it as a rule of this court. But this, as I have said, arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer must therefore be considered as not invalid, in point of law, at the

time of the contract—and being made before the war, it must be judged according to the ordinary rules of commerce."[1]

A ship sailed from Demerara for Middleburgh, in Holland, on the 30th of January, 1781, about six weeks after the commencement of hostilities between Great Britain and Holland. On the 14th of March following, Demerara surrendered to the British forces. The ship was captured at sea on the 25th of March.

In pronouncing the judgment of the court in this case, Lord Stowell says: "The terms of capitulation were very favorable. The inhabitants were to take the oath of allegiance, to be permitted to export their own property, and to be treated, *in all respects*, like British subjects, till his majesty's pleasure could be known; and although this was in the first instance only under the proclamation of the captor, still, that being accepted, it took complete effect. These terms were afterwards confirmed by the king. There was, therefore, as strong a promise of protection as could be, and recognized and confirmed by the supreme authority of the state.

"Under these circumstances, the judge of the admiralty thought the claim so strong, that he ordered it restored; and it was not *his* opinion alone. On appeal, however, the Lords were of opinion that property sailing after declaration of hostilities, and before a capitulation, and taken on the voyage, was not protected by the intermediate capitulation. It was not determined on any ground of illegal trade, nor on any surmise that, when the owners

[1] *The Vrow Margaretha*, 1 Rob., 337.

became British subjects, the trade in which the property was embarked became, *ex post facto*, illegal. Nor was it at all taken into consideration that Demerara had again become a Dutch colony at the time of adjudication. It was declared to be adjudged upon the same principles as if the cause had come on at the time of the capture. It was not on any of these grounds, but simply on the ground of Dutch property, that condemnation was passed. *The ship sailed as a Dutch ship, and could not change her character in transitu.* This was the *dictum* of a great law lord then present—Lord Camden."[1]

Many cases have arisen of colorable transfers, made under a great variety of circumstances, such as might well be expected from human ingenuity exercised for the protection of vast interests. They are interesting only as expositions of the acuteness of captors in tracking and developing the deceitful and fraudulent character of the transfer, and the ingenuity and skill of claimants in eluding investigation.

Transfers in general.

A transfer made by an enemy to a neutral during or in contemplation of war, is illegal, because in fraud of a vested belligerent right.

Any reservation of interest in the transfer, any thing short of an absolute and unconditional sale, is held to pass no title whatever to the property, but that it remains in the enemy, subject to capture.[2]

Reservations of risk.

So, too, a reservation of risk to neutral consignors, in order to protect belligerent consignees, are uni-

[1] *The Negotie en Zeevart*, 1 Rob., 111; *The Dankebaar African*, 1 *Rob.*, 107; *The Jan Frederick*, 5 Rob., 128.

[2] *The Anoydt Gedacht*, 2 Rob., 137; *The Sechs Geschwistern*, 4 Rob., 100.

formly regarded by courts of admiralty as fraudulent and invalid.

In the last war between Great Britain and France, a cargo was shipped on board the ship *Sally Griffiths*, ostensibly on account of American merchants. Upon the examination on the capture, the master testified to his belief that the cargo, upon being unladen, would have become the property of the French government. It was obvious, therefore, that a sale had been legally completed; and the use of American names as consignees, on whose risk and account the shipment was pretended to be made, was solely to evade the result of a capture, if the cargo had been shipped avowedly as French property.

"It has always been the rule of the prize court," says Sir P. Arden, in this case, "that property, going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. When the contract is made in time of peace, or without any contemplation of war, no such rule exists. But, in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses for the account and risk of American merchants; but papers alone make no proof, unless supported by the deposition of the master. Instead of supporting the contents of his papers, the master deposes, 'that on arrival, the goods would become the property of the French government;' and all the concealed papers strongly

support him in this testimony. The *evidentia rei* is too strong to admit of further proof. Supposing it to have become the property of the enemy on delivery, capture is considered as delivery; the captors, by the right of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property."[1]

In the leading case of the packet *De Bilboa*,[2] which was that of a shipment at the risk of the consignor until delivery, as having been made before the war, Lord Stowell considers the subject with his usual learning and ability. He says: "The statement of the claim sets forth that these goods have not been paid for by the Spaniard. That would go but little way; that alone would not do. There must be many cases in which British merchants suffer from capture by our own cruizers, of goods shipped for foreign account before the breaking out of hostilities. The claim goes on to state, 'that according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignees till the arrival of the goods—that the sea risk, in peace as well as war, is on the consignor, that he insures, and has no remedy against the consignee for any accident that may happen during the voyage.' Under these circumstances in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master, are considered as delivered to the consignee, whose agent the master is in this respect—but that general contract of the law may be varied by spe-

[1] *The Sally Griffiths*, 3 Rob., 133. [2] *De Bilboa*, 2 Rob. 133.

cial agreement, or by a particular prevailing practice that presupposes an agreement among such a description of merchants. In time of profound peace, when there is no prospect of approaching war, there would be unquestionably nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war, this cannot be permitted, for it would at once put an end to all captures at sea—the risk would, in all cases, be laid on the consignor, where it suited the purpose of protection. On every contemplation of war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture. It is therefore considered to be an invalid contract in time of war, or, to express it more accurately, it is a contract which, if made in war, has this effect, that the captor has a right to seize it and convert the property to his own use; for he, having all the rights which belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy, and the shipper, who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea-risk, and he has nothing to do with the

case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment and throws it upon the shipper, the shipper must be supposed to have guarded his own interest against that hazard, or he has acted improvidently and without caution. The present contract, however, is not of this sort. It stands as a lawful agreement being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper. If they had been lost, on whom would the loss have fallen but upon him? What surer test of property can there be than this? It is the true criterion of property, that if you are the person on whom the loss will fall, you are to be considered as the proprietor. To make the loss fall upon the shipper in such cases, would be harsh in the extreme. He ships his goods in the ordinary course of traffic by an agreement mutually understood between the parties, and in nowise injurious to the rights of any third party. An event subsequently happens which he could in no degree provide against. If he is to be the sufferer, he is a sufferer without notice, and without the means of securing himself. He was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods."

Upon the general rule of the invalidity of transfers from belligerents to neutrals made during or in contemplation of war, as affording exemption from liability to confiscation on capture, Chancellor Kent observes:

"Such agreements, if they could operate, would go to cover all belligerent property, while passing between a belligerent and neutral country, since

the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of these relations."

And again the learned chancellor says, referring to the same subject: "These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts of the United States. The great principles of national law were held to require, that in war, enemy's property should not change its hostile character *in transitu*, and that no secret liens, no future election, no private contracts looking to future events, should be able to cover private property while sailing on the ocean. Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings in prize courts would be lost."[1]

[1] Kent's Com. I., 94; *The Josephine*, 4 Rob., 25; *The Tobago*, 5 Rob., 218; *The Mariana*, 6 Rob., 24; *The Francis*, 1 Gall., 445; 8 Cranch, 335; *The Sisters*, 5 Rob. 155; *Vrow Catherina*, 5 Rob., 161; 1 Duer on Insurance, 478.

During the existing civil war in the United States, there seems to have prevailed among the British merchants there resident, the like misapprehension in relation to their rights, which so fatally misled American citizens resident abroad during the last war between Great Britain and Holland. They appear to have supposed themselves entitled to retain all the privileges of British subjects, with-

out regard to the fact of their residence and occupation in another country.

Recent American decisions on the doctrine of hostile character by hostile residence

As this misapprehension of American citizens, during the war between England and Holland, was taught them to their cost, by the decisions of the courts of Great Britain (as we have seen in the cases before cited); so the same error of the British subjects residing in the southern ports of the American Union, has been in like manner corrected, by numerous recent decisions of the courts of the United States.

The *Sarah Starr*. United States Court, New York.

The brig *Sarah Starr*, in the month of July, 1861, three months after the proclamation of blockade by the executive authority of the United States, was lying at Wilmington, North Carolina, one of the blockaded ports.

She was then owned by Messrs. Monroe, citizens of Rhode Island, having business connections and transactions in North Carolina. Through the agents and correspondents of Messrs. Monroe, in Charleston, South Carolina, a negotiation was made, by which the vessel was transferred to one Cowlan Gravely, a merchant, residing and transacting business at Charleston, but an Englishman by birth, and still owing allegiance to the British crown.

This transfer having been consummated, the British consul at Charleston supplied the vessel with a provisional register. The vessel was laden with naval stores, and, under a clearance and pass from the insurgent authorities, she left Cape Fear river on the 3d day of August, and shortly after crossing the bar, was captured by the United States steamer *Wabash*, and sent to the port of New York for adjudication.

The question of the liability of the vessel to condemnation, as impressed with a hostile character, by reason of the residence of Cowlan Gravely in the country of the enemy, as his permanent business domicile, was distinctly raised in the case, and the doctrine, as well settled both in the English and American authorities, upon this subject, was recognized and affirmed.

At about the same time, the British consul at Charleston was employed in furnishing with provisional registers some five or six other vessels, lying at the different blockaded ports, and which had been in like manner transferred to the same Cowlan Gravely.

Several of them were captured, and the British title, which had been resorted to, was held to be no protection from condemnation. (*Vide The Aigburth*—MS. Decisions of United States District Court of New York.

The *Joseph H. Toone*. United States Court, New York.

The *Joseph H. Toone*, captured in October, 1861, while attempting to violate the blockade of New Orleans, by the United States ship *South Carolina*, and sent to New York for adjudication, was claimed by one Aymar, who was on board as a passenger at the time of capture. Her previous owner was a citizen of New Orleans; and the vessel left New Orleans on her preceding voyage, with Aymar on board, successfully evading the blockade, and proceeded to Havana. Previous to her departure, the New Orleans owner delivered to the master a power of attorney to sell the vessel; and, under this power, the master executed a transfer to Aymar, in Havana. Aymar being, or claiming to be, a British subject, the British consul supplied the vessel with

a British register, which evidence of neutral ownership was found on board at the time of capture.

Aymar was examined as a witness on the standing interrogatories; and testified that he was a British subject, born at St. Andrews, in the British province of New Brunswick, and that *he called* St. Andrews his place of residence, but *had transacted business in New Orleans for eight years past.*

There were many other grounds upon which this vessel and cargo (which consisted of warlike munitions almost entirely) were clearly subject to confiscation as lawful prize, but the permanent business residence of the claimant of the vessel, as sworn to by himself, was considered quite conclusive, as impressing upon the property such hostility of character as rendered it lawful subject of capture as the property of the enemy.

So also the recent adjudications in the United States District Court of Pennsylvania, in the case of the *General Parkhill*, and in the United States District Court of Massachusetts, in the case of the *Revere.* The *General Parkhill.* U. S. Court, Penn.

In this latter case, the learned judge says:

"Property of persons resident in an enemy's country is deemed hostile, and subject to condemnation, without any evidence as to the individual opinions or predilections of the owner. *If he be the subject of a neutral*, or a citizen of one of the belligerent states, and has expressed no disloyal sentiments toward his native country, still, *his residence in the enemy's country impresses* upon his property engaged in commerce, and found upon the ocean, a hostile character, and subjects it to condemnation." The *Revere.* United States Court, Mass.

The *General Parkhill.* U. S. Court, Penn

In recognition and application of this doctrine, the learned judge of the United States Court in Pennsylvania, in the case of the *General Parkhill*, uses the following language :—

"One of the purposes of naval warfare is to diminish the power of hostile governments, or of other hostile organizations, by the indiscriminate maritime capture of the property of all persons residing in places within hostile dominion, or in permanent or temporary hostile occupation.

"The capture and confiscation of such property, by destroying or suppressing the maritime trade of such places, diminishes their wealth, and thus reduces the power of their hostile rulers.

"The liberation of the property when captured, whether the individual residents who owned it are well or ill affected in feeling toward the government of the captors, would restore its value in wealth to the hostile place.

"The rule of confiscation applies, though the resident may owe a duty of allegiance to the captor's government, and may, while in the hostile place, have been perfectly loyal in his own feeling and conduct.

"After the declaration of war against England, in 1812, a citizen of the United States, residing in England, before any knowledge of the war, shipped merchandize for the United States, which, having been captured on the voyage, was condemned as prize. The Supreme Court said, 'although he cannot be considered an enemy in the strict sense of the word, yet, he is deemed such with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence.'"

"Those predatory maritime hostilities, which the law of war sanctions, could not be prosecuted with effect, if this rule were not applied with inexorable rigor."

So, too, in the case of the *Amy Warwick*, the distinguished judge of the United States Court in Massachusetts, takes occasion to enforce the familiar doctrine, as follows: The *Amy Warwick*. United States Court, Mass.

"What shall be deemed enemy's property is a question of frequent occurrence in prize courts, and on which certain rules and principles are well established.

"Property of persons resident in an enemy's country is deemed hostile, and subject to condemnation, without any evidence as to the individual opinions or predilections of the owner. If he be the subject of a neutral, or a citizen of one of the belligerent states, and has expressed no disloyal sentiments toward his native country, still, his residence in the enemy's country impresses upon his property engaged in commerce, and found upon the ocean, a hostile character, and subjects it to confiscation." (*The Venus*, 8 Cranch, 253. See also *The Hoop*, 1 Rob., 196, and the cases there collected.)

Although, from the numerous adjudications upon captured vessels, transferred by public enemies to British subjects residing in the enemy's territory, during the existing war, the error seems to have been quite prevalent, that immunity from capture was, by such transfer, secured; there, nevertheless, seems to have been an apprehension, that a transfer of a vessel by an enemy to a neutral, in a blockaded port, might be of questionable validity. And thus,

as in the case of the *Toonie*, the contrivance was resorted to of executing the transfer in a foreign port, through the medium of a procuration executed in the blockaded port.

Inasmuch as the transferree in that, as well as in most of the other cases, was a domiciliated business resident of the country of the enemy, the question of the validity of the transfer, as made in a blockaded port, or during war, by an enemy to a neutral, became of secondary importance.

But the ingenuity of man is unequal to the task of rendering valid by indirection, an act which the law invalidates when done directly.

Transfers by enemies to neutrals during war void, as a fraud on belligerent rights.

The transfer of a vessel by power of attorney, whenever made, is the act of the principal, and although done by the agent in a foreign port, in legal intendment, it is not less the act of the principal at his own domicile.

But subsidiary to all this, is the well settled principle, under which such transfers become mere waste paper; it is that principle, well established in the law of nations, that a transfer by an enemy to a neutral in time of war, or in aid of a contemplated war, is void, as in fraud of belligerent rights.

The undoubted belligerent right of conquering from the adversary an honorable peace, by inflicting a blow upon his ocean commerce, is directly invaded, and may be wholly destroyed by the acts of neutrals, in becoming possessed of that commerce; and hence, the law regards such acts as in no manner changing the true ownership of the property.

The *Mersey*. U. S. Court, New York.

The schooner *Mersey* belonged to a citizen of Charleston, South Carolina, and succeeding in get-

ting out of that port in violation of the blockade, in March 1862, went to the British port of Nassau, where, through a power of attorney executed in Charleston, she was transferred to a British subject residing at Nassau, and thereupon clothed with a British register. Being captured on her next voyage, two days out from Nassau, and sent to New York as prize of war, the learned judge of that district, in adjudicating upon the questions raised in the proceedings against her, affirms this doctrine in the following emphatic language :—

"For aught that appears before the court, this vessel retained the same character and ownership she bore when she left Charleston, and entered the port of Nassau, the last of March, and at the time the British register on board her, was executed at Nassau. Beyond that subsidiary principle is the higher doctrine, that a transfer of property to a neutral by an enemy in time of war, or in aid of a contemplated war, is illegal, as in violation and in fraud of vested belligerent rights." (The *Bernon*, 1 Rob., 86; 2 *ibid.*, 114, note *a;* 6 *ibid.*, 396, note 400; 2 *ibid.*, 281; The *Rosalie and Betty.*) (*Vide* MS. Decisions in Prize, of United States District Court of New York.)

Secret liens disregarded by courts of prize.

The doctrine that secret liens upon captured property are wholly disregarded in prize courts, and that confiscations enure to the benefit of captors, discharged from all such incumbrances as are not visible at the time of capture, has been affirmed and enforced by the Federal courts of the United States, in recent adjudications.

In the cases of the *Hiawatha*, the *Crenshaw*, the

Lynchburg, and others, many of the claimants of the captured property were persons who had made advances upon portions of merchandize shipped on board the vessels captured, and claimed a lien upon the property, by express agreement, as security for the advances.

Such claims were held to be inadmissible, except in the instance where the bills of lading were indorsed to the person making the advance, giving to him the actual right of possession of the property, leaving to the shipper only a claim to the surplus of proceeds after payment of advances.

In the case of the *Delta*, adjudicated in the New York Federal court, citizens of Massachusetts claimed a lien upon the captured vessel to the amount of £1,900, by virtue of a mortgage upon the vessel to that amount, executed in London, by the holder of the legal title, and assigned to them.

The claim was rejected by the eminent judge, who, in passing upon the question, says:

"Preliminary to the question of prize or no prize, to be determined upon the proofs, is one in relation to the character of the claim of Isaac and Seth Adams, and their right to assert the same, as against the captors."

"Although the conclusions to which the court has arrived, upon the main question, cannot be affected by the determination of that of a mortgagee of captured property to assert his mortgage in a prize court, and demand that it be paid out of the proceeds of the property, if condemned, it is nevertheless proper to consider that question."

"Charles W. Adams being the sole owner of the brig, executed a bill of sale to the claimant, Marsh,

in Liverpool, and took back from him a mortgage to secure the purchase-money, for £1,900 sterling."

"Isaac and Seth Adams, claim solely as the holders and owners of this mortgage."

"Now there is, perhaps, no doctrine better settled in the law of maritime capture, than this—that all liens upon captured property, which are not, in their very nature, open and visible (like that for freight for enemy cargo laden on board a neutral vessel) are disregarded by prize courts.

"The great principles of international law require that no secret liens, no mortgages, no bottomry bonds, no claims for repairs, supplies, or advances, should be allowed to cover and protect private property while sailing on the ocean. If the door were once opened for the admission of equitable claims and liens, there would be no end to discussion and imposition, and the simplicity and celerity of prize proceedings would be alike sacrificed. (*The Francis*, 1 Gall., 445; *The Josephine*, 4 Rob., 25; *The Tobago*, 5 Rob., 218; *The Mariana*, 6 Rob., 24; *The Sisters*, 5 Rob., 161.)

"The claim, therefore, of the brothers, Isaac and Seth Adams, is one that cannot be regarded in this court."

In the case of the *Arcola*, adjudicated in the District Court of the United States in Maryland, the learned judge, while recognizing the correctness of the doctrine, allows the claim of the mortgagee of the vessel, solely because his lien was visible.

The *Arcola*. United States District Court, Maryland.

In reviewing the cases in which liens upon captured property have been disallowed, the learned judge says:

"Now these were all secret liens, of which the

captors could learn nothing when they made the capture, and depending for their existence upon the different laws of different countries. The difficulties which the examination of such claims would impose upon the prize courts in deciding upon them, have excluded such claims from their consideration. But do these considerations apply to the case of a mortgage, regularly recorded under the act of Congress of July 29th, 1850, and indorsed on the certificate of enrolment? Our act of Congress does not require the mortgage or memorandum thereof, to be indorsed on the vessel's register or enrolment, as the statute of 6 Geo. IV., ch. 20, and subsequent British statutes do. But it was done in this case, and it is a practice that should be followed in similar cases. It notifies the captors, immediately on inspection of the ship's papers, that there is an interest in the vessel, vested in parties friendly to the government, and puts them to their election whether, under such circumstances, they will proceed in the capture."

Upon this ground the claim was allowed, upon terms, as to costs.

The *Amy Warwick. Claim of John L. Phipps & Co.* U. S. Court, Mass.

In the case of the *Amy Warwick, on the claim of John L. Phipps, & Co.*, decided in the United States District Court for the District of Massachusetts, the learned judge, in applying the law in relation to liens upon captured property, takes occasion to declare the distinction between such liens as may be upheld in a court of prize, and such as cannot be protected, which seems to cover the whole ground.

He says: "The counsel for the captors contend that the claimants had only a lien on this cargo,

and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine and the reasons on which it is founded, are stated by the Supreme Court, in *The Francis*, 8 Cranch, 418. It is there said that 'cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud.' Similar reasons are given by Lord Stowell, in *The Marianna*, 6 Rob., 25, 26, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Co., that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance on the property of another. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid.

"In *The Francis* and many other cases it is held that the lien of a neutral carrier for the freight of enemy's goods, is upon capture to be allowed. The general doctrine seems to be that where a neutral has a *jus in re;* where he is in possession with a

right of retention until a certain amount is paid to him, the captor takes *cum onere* and must allow the amount of such right. But where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court. (*The Tobago*, 5 Rob., 218.)"

CHAPTER IV.

Of the Rights of Belligerents to Interfere with each other's Commerce, and Capture each other's Property—and herein of Embargo—of Letters of Marque and Reprisal—of Capture and Joint-Capture and Recapture—of Postliminium and Military Salvage.

A remark attributed to the king's advocate in the early case of *Potts* vs. *Bell*,[1] that "there is no such thing as a war for arms and a peace for commerce," has since been adopted by the elementary writers, us a happy statement of an axiom in the law of nations.

The commerce of the enemy has, in all ages, been regarded as the legitimate prize of war.

The commerce of the enemy the legitimate prize of war.

The character and effects of what are considered the several rights of war relative to hostile commerce, will form the subject of this chapter.

As a starting point, it will be instructive to consider the great leading principles, as they have been laid down by the early authoritative writers, as forming the basis of the existing law of nations.

Leading principles on this subject in national law.

"A state, taking up arms," says Grotius,[2] "in a just cause, has a double right against her enemy—first, a right to obtain possession of her property withheld by the enemy, to which must be added the expenses incurred in the pursuit of that object—the charges of war and the reparation of damages—for, were she obliged to bear those expenses and

[1] 8 Term Rep., 548.

[2] Grotius, B. III., c. vi.

losses, she would not fully recover her property nor obtain her due. Secondly, she has a right to weaken her enemy, in order to render him incapable of supporting his unjust violence, a right to deprive him of the means of resistance.

"Hence, as from this source originate all the rights which war gives us over things belonging to the enemy, we have a right to deprive him of his possessions—of every thing which may augment his strength and enable him to make war. This, every one endeavors to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property, and convert it to our own use, and thus, besides diminishing the enemy's power, we augment our own, and obtain at least a partial indemnification or equivalent either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution—in a word, we do ourselves justice."

Professor Martens, of Gottingen, in his "Summary of the Law of Nations,"[1] makes the following condensation of the elementary doctrines: "The conqueror has a right to seize on the property of the enemy, whether movable or immovable. These seizures may be made; 1st, in order to obtain what he demands as his due or equivalent; 2d, to defray the expenses of the war; 3d, to force the enemy to an equitable peace; 4th, to deter him, or by reducing his strength, to hinder him, from repeating, in future, the injuries which have been the cause of the war. And, with this last object in view, a power at war has a right to de-

[1] Marten's Lib. VIII., c. iii., § 9.

stroy the possessions and property of the enemy, for the express purpose of doing him mischief. However, the modern laws of war do not permit the destruction of any thing, except, 1st, such things as the enemy cannot be deprived of by any other means than those of destruction, and which it is at the same time necessary to deprive him of; 2d, such things as, after being taken, cannot be kept, and which might, if not destroyed, strengthen the enemy; 3d, such things as cannot be preserved without injury to the military operations. To all these we may add, 4thly, whatever is destroyed by way of retaliation."

The subject of the belligerent right of the destruction or confiscation of the property of the enemy, acquires a peculiar interest in its connection with the insurrection against the government of the United States, raised by certain malcontents in the southern portion of the country, and in its application to the negroes held as slave property by a small portion of the people in the insurgent territory.

The solution of this question assumes a momentous importance, when it is considered in connection with the obvious and imperative duty of the government, in the suppression of a rebellion, which, in any event must involve a pecuniary loss of many millions to the people, and may entail a loss of greater magnitude than the highest estimated value of the entire negro population held as slave property—to remove all possible ground or occasion for future domestic commotion, from the same real or pretended cause.

It would be out of place, in a work of this char-

acter, to enter into a discussion of the subject, either in its moral aspects, or as one of political expediency.

In its legal bearings, it has been recently stated with much brevity, but with great ability and precision, by the learned and distinguished jurist who so worthily succeeds the late Mr. Justice Story in the Dane professorship of law, in the university at Harvard.

We are permitted to extract this statement from a lecture lately delivered by Professor Parsons in the course of his professorial duties:

"Many of you have asked of me what would be the law or the legal rights which an army, advancing by order of the President into a state in organized rebellion, would carry with it, as to the slaves. I will endeavor to answer this question.

"In the first place, that army must have the rights, and all the rights of war. Because, if a state puts itself into that position with reference to the United States, the government of the United States must necessarily accept that position while carrying on the conflict, although the general government prosecute the war with no desire of subjugation, but only for the purpose of bringing that state back to its original position.

"There are four ways in which that army might deal with slaves. One is, to seize and use them in its military labors. That they might do this, seems to me as certain as that they might seize horses or oxen to draw their wagons, or shovels to dig their trenches. How far compensation should be made must depend upon circumstances. It is a common opinion that civilization has so far mitigated war,

that it is no longer one of the laws of war that an invading army may seize, use, or destroy private property. This is a mistake, according to all the authorities on the law of nations. It is undoubtedly true, however, that the modern usages and proprieties of war—and there are such things—would justify the exercise of this right only on the ground of military necessity.

"The second way, is to receive and harbor all runaway slaves. And the third is but a step further in the same direction, although it may seem to be a wide step: it is to liberate them, not, as it were, passively, but by proclamation, or other active measures. As a matter of law, I have not the least doubt of the right of an invading army to do this.[1] It would, regarded as a mere question of law, stand on the footing of a destruction of private property in an enemy's country; and like that, it would be an unquestionable right; but if the usages of war were to govern it, it would be a right to be exercised only as a military necessity, and for the purpose of weakening the enemy, and lessening his means of attack or resistance. And the existence of this necessity must be determined by the commanding officer, or by the supreme authority at home, in view of all the circumstances of the case. Should there be a war between two slave states, say Georgia and South Carolina, and Georgia should invade South Carolina, I have no doubt that the invading forces might and would claim and possess the right to exercise these means of weakening their enemy, if they thought proper.

"The fourth way of dealing with slaves would be to put weapons into their hands and incite them

[1] *Vide* Appendix, No. ix.

to armed insurrection. If any such right as this can ever exist, it can only spring from the extremest necessity, and from a condition of things which it would be difficult and painful to imagine. With my understanding of what an armed servile insurrection must be, I may illustrate my view of the law thus: an army which invested a city that was supplied with water by a stream flowing into it, would have a military right to cut off the stream and so reduce the city to submission. But it would have no right, military or other, to poison the waters. There seems to me, as matter of law, a good test for this. The commander of an invading army might certainly, as a military necessity, liberate the slaves and make any use of them which he could make of his own soldiers, but nothing more.

"Questions of a moral nature, and others of expediency, gather around this topic of the treatment of slaves by an invading force. I have avoided all reference to them, not because I am insensible to their existence or force. But it is my business here to speak to you, as well as I can, of the law, and I believe I can speak of it more accurately, if I speak only of the law."

Embargo defined.

The first mode which we shall consider, and usually the first in order of time, upon the breaking out of a war, in which a belligerent proceeds to assail the commerce of the enemy, is by what is called an embargo—the purpose and effect of which is, to detain vessels in the ports where they may be lying.

There are two kinds of embargoes; and although each is an act of hostility designed to weaken the

commerce of the enemy, they have been distinguished by designating the one as warlike, as operating directly upon the vessels of the enemy; and the other as civil, as operating upon those of the citizens or subjects of the nation proclaiming the embargo. Warlike and civil.

Vattel says:[1] "The sovereign can neither detain the persons nor the property of those subjects of the enemy who are found within his dominions at the time of the declaration; they came into his country under the public faith. By permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return; he is, therefore, bound to allow them a reasonable time for withdrawing with their effects, and if they stay beyond the term prescribed, he has a right to treat them as enemies—as unarmed enemies, however. But if they are detained by an insurmountable impediment, as by sickness, he must necessarily and for the same reason, grant them a sufficient extension of the term. At present, so far from being wanting in this duty, sovereigns carry their attentions to humanity still further, so that foreigners who are subjects of the state against which war is declared, are very frequently allowed full time for the settlement of their affairs. This is observed in a particular manner with regard to merchants, and the case is, moreover, carefully provided for in commercial treaties."

It would, on first consideration, appear that the rule of justice and public faith thus laid down by Vattel, was violated by the modern practice of the Modern practice as to embargo.

[1] Lib. III., c. i., § 63.

imposition of embargoes upon the commencement of hostilities; but it must be remembered that declarations of war, under the present law of nations, are not merely the formal notification of hostilities. There are always preceding acts of a hostile character, which, to some intents, are deemed to be equivalent to formal declarations; these acts may be subsequently satisfactorily explained, and by a reconciliation be annulled. When therefore, a nation receives certain injuries from another, for which she can see no prospect of redress, she is forced to regard such injuries as tantamount to a declaration of hostilities, and therefore proclaims an embargo upon the commerce of the offending state then lying within her ports, in order to indemnify herself in the only way in which, perhaps, it may be possible for her to obtain indemnification at all. In such cases, the hostile property which comes to her possession after the commission of the injurious acts, may very justly be regarded as having so come after the declaration of hostilities, although there may have been no formal notification or declaration of war.

Operation and effect of embargo.

Upon this right of seizure, under such an implied declaration of hostilities, and upon the effect of such seizure, in the event of an adjustment of difficulties, before any formal declaration is made, Lord Stowell makes some instructive comments, in a case before him, in which the subject was involved.[1]

In that case, an embargo upon Dutch property had been declared by Great Britain, prior to any formal or open declaration of war against Holland;

[1] *The Boedas Lust*, 5 Rob., 246.

but after the commission of certain acts of injustice by that government, as were regarded equivalent, in their hostile character, to a declaration of war against Great Britain. The formal declaration of war, which was subsequently made, was held to have a retrospective effect, as rectifying and confirming whatsoever had been done pursuant to the embargo, ordered in consequence of the implied declaration.

"The seizure," says the learned judge, "was at first equivocal; and if the matter in dispute had terminated in a reconciliation, the seizure would have been converted into a mere civil embargo, so termed.

"That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo. It is no longer an equivocal act, subject to two interpretations. There is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of trespassers, *ab initio*, and guilty of injuries which they have refused to redeem by any alteration of their measures. This is the necessary course, if no compact intervenes for the restitution of the property taken before a formal declaration of hostilities." In another case,[1] the same learned judge observed: "Actual hostilities are not to be reckoned

[1] *The Herstelder*, 1 Rob., 114.

merely from the date of the declaration, but such declaration has been applied with a retroactive force."

There is no doubt that embargo, as practised in modern times, is sanctioned by the uniform usage of nations.

It substantially conforms to that practised by the Syracusans in the time of Dionysus the Elder (which Mr. Mitford, in his History of Greece, considers a gross violation of the law of nations), who, having declared war against Carthage, at once seized the effects of Carthaginian traders in their warehouses, and Carthaginian vessels in their harbors, and then sent a herald to Carthage to negotiate.

This act of the Syracusans is not distinguishable from the ordinary practice of Great Britain, as declared by Lord Mansfield:[1] "Upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made."

Civil embargo.

The consideration of the subject of civil embargoes, as they are called, would be apart from the purpose of this treatise. It is sufficient here to say, that the authority of the government to enforce an embargo upon the ships and merchandise of its citizens and subjects, has been made a subject of grave discussion, both in the United States and in Great Britain. "The civil embargo," says Beawes,[2] "is laid on ships and merchandise in the ports of this kingdom by virtue of the king's proclamation,

[1] *Lindo* vs. *Rodney*, Doug., 613. [2] Lex Mercatoria, 271.

and is strictly legal, when the proclamation *does not contravene the ancient laws, or tend to establish new ones*, but only to enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary." The same doctrine, *with the like qualifications*, is laid down by Blackstone.[1]

But it has been held that a civil embargo cannot be enforced upon British ships in a foreign port, unless by the consent of the nation to which that port belongs; for the reason that such an embargo would operate to the prejudice of the rights of neighboring nations, which cannot lawfully be disturbed, however much such an act might operate for the benefit of the nation seeking to enforce it.[2]

The embargo ordered by the United States government in 1807.

Whether the civil embargo imposed by the Congress of the United States in 1807 was sanctioned by the constitution of the government, was made a subject of much learned discussion in the federal tribunals at that time, and of much angry controversy in the political assemblages of the people.

Its oppressive effects on the commerce of the nation.

It is certain, that without in any manner accomplishing the hostile purpose towards Great Britain, which led to its adoption, it inflicted injuries upon the commerce of the northern and eastern states of the Union, of a tenfold greater severity than all the combined injuries received by the southern states, in consequence of an insufficient protection of their peculiar property. It was contended that the power conferred upon Congress to *regulate* commerce, did not carry with it the power to destroy, to put an

[1] Blackstone's Com., I., 7; *vide* also 4 Mod., 177; Skinner, 93; 1 Selkeld, 32.

[2] *The Gertrude*, 2 Rob., 211.

end to commerce altogether. That regulation was a guidance, a control, an establishment of rules for the government of commerce, and not the power of extinguishing it absolutely and without limitation of time. But the people whose interests were invaded by this measure of the government, the thousands and hundreds of thousands who were utterly impoverished and beggared by its results, did not nullify the law—they did not rebel against the government—they did not seize upon the public property—they did not trample upon the constitution and the insignia of their common country, and undertake to erect themselves into a separate confederacy. They referred the question to the solemn decision of the federal tribunals; and when those tribunals pronounced the embargo act constitutional, they acquiesced in that decision. The great commercial interests of the United States believed the embargo act to be unconstitutional, clearly, palpably so; but they did not seek to take the law into their own hands, "*because they did not wish to bring about a revolution nor to break up the Union.*" They saw that "between submission to the decisions of the constituted tribunals, and revolution or disunion, there was no middle ground, no ambiguous condition, no half allegiance and half rebellion."

Submitted to when pronounced constitutional by the courts.

The principle upon which the law of nations recognizes the right of a sovereign state to impose a warlike embargo, forms the basis of what are called *reprisals.*

Reprisals generally.

"Reprisals,"[1] says Vattel, "are used between nation and nation, in order to do themselves justice,

[1] Vattel, B. II., c. xviii., § 342.

when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if she refuses to pay a debt or repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to her own advantage, till she obtains payment of what may be due to her, together with interest and damages, or keep it as a pledge till she has received ample satisfaction. In the latter case, it is rather a stoppage or seizure, than a reprisal—but they are frequently confounded in common language. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused, from the moment war is declared or hostilities commenced, and then also the effects seized may be confiscated." To redress individual wrongs.

"In reprisals," continues the same author, "we seize on the property of the subject, just as we would on that of the state or sovereign. Every thing that belongs to the nation is subject of reprisals whenever it can be seized, provided it be not a deposit intrusted to the public faith. As it is only in consequence of that confidence which the proprietor has placed in the good faith of the government that such a deposit happens to be made, it ought to be respected even in open war—such is the conduct observed in England and elsewhere, with respect to the money which foreigners have placed in the public funds."

The sovereign or supreme power of a nation is

alone vested with the authority of making or ordering reprisals. This is the universal rule of all civilized communities. It is not doubted that the right to authorize reprisals, exists as well for the redress of wrongs inflicted upon the citizen of a state, as upon the state itself.

Commissions, or letters of marque, however, to secure individual redress, are rarely issued, and never but in a case of undoubted and flagrant wrong. Upon this interesting question, the remarks of Viscount Palmerston, made in the British Parliament in 1847, upon the motion of Lord George Bentnick for the "adoption of such measures as might secure for the British holders of unpaid Spanish bonds, redress from the government of Spain," are particularly instructive. He said:

"My noble friend has quoted passages from the law of nations, laying down the doctrine that one government is entitled to enforce from another, redress for all wrongs done to the subjects of the government making the application for redress, and that if redress be denied, it may justly be obtained by reprisals from the nations so refusing. I fully admit to this extent, the principles which my noble friend has laid down. At the same time, I am sure the house will see that there may be a difference and distinction drawn in point of expediency, and in point of established practice, as to the application of an indisputable principle to particular and different cases. Now, if the government of Spain had, we will say, for example, violently seized the property of British subjects, this country being on terms of amity with Spain, under treaties, no man will for a moment, hesitate in declaring, that it

would be the duty of this government to enforce redress. In the same manner, in any transaction that is founded on mutual compact between two governments, in any transaction that is founded on the previous sanction of the government, whose subject is the complainer, in any case of that sort, it has been the practice of Great Britain to demand and insist upon redress. Again, if any act of injustice in the prosecution of trade and commerce, be inflicted on British subjects, there can be no question as to the course which this country ought to pursue. But a distinction has always been drawn between the ordinary transactions of British subjects with the subjects of other countries, and the transactions of British subjects with the governments of other countries. When a British subject, engaged in trade with a foreign country, sustains a loss, his first application is, to the law of that country for redress. If that law is not properly administered in his case, then the British government steps in and demands, either that the law shall be properly dealt out, or that redress shall be given by the government of that state. It is to the advantage of this country to encourage commercial dealings with foreign countries—but I do not know that it is to the advantage of this country to give great encouragement to British subjects to invest their capital in loans to foreign countries. I think it is inexpedient, for many reasons, that that course should be pursued. It exposes British subjects to loss from trusting governments that are not trustworthy; and if this principle were adopted as a guide for the practice of British subjects, that the payment of such loans should be enforced by the

arms of England, it would place the British nation in the situation of being always liable to be involved in serious disputes with foreign governments, in matters with regard to which the British government of the day might have had no opportunity of being consulted, or of giving an opinion one way or the other. Although I entreat the house, upon grounds of public policy, not to impose at present, upon her majesty's government, the obligations sought to be thrown upon them, yet I would take this opportunity of warning foreign governments, who are the debtors to British subjects, that the time may come, when this house will not sit patient under the wrongs and injuries inflicted upon the subjects of this country.

"I warn them that the time may come, when the British nation will not see with tranquillity the sum of £150,000,000 due to British subjects, and the interest, not paid—and I must warn them, that if they do not make proper efforts, adequately to fulfil their engagements, the government of this country, whatever men may be in office, may be compelled, by the voice of public opinion, and by the votes of Parliament, to depart from that which has hitherto been the established practice of England, and to insist upon the payment of debts due to British subjects. That we have the means of enforcing the rights of British subjects, I am not prepared to dispute. It is not because we are afraid of these states, or all of them put together, that we have refrained from taking the steps to which my noble friend would urge us. England, I trust, will always have the means of obtaining justice for its subjects from any country on the face of

the earth. But this is a question of expediency, and not a question of power. Therefore let no foreign country, which has done wrong to British subjects, deceive itself by a false impression, either that the British nation or the British Parliament will ever remain patient under wrong, or that, if called upon to enforce the rights of the people of England, the government of England will not have ample power and means at its command to obtain justice for them."

Right acknowledged by all nations.

This principle is not only fully acknowledged, but in several instances it has been acted upon by the government of the United States. In the year 1834, it was proposed by President Jackson, as a measure of redress against France, on behalf of citizens of the United States, having lawful claims against that nation; and again in 1847, the non-payment of debts due to American citizens by the republic of Mexico was made the leading ground of the war which was carried on against that nation.

Acted upon by the United States.

These general reprisals, for the redress of individual wrongs, are considered by publicists as a species of hostility, an imperfect war, and usually a prelude to open hostilities. They are experimental attempts to secure indemnity without an open conflict of arms, which are successful or otherwise, according to the character of the matter in dispute, and the relative situation, character, strength, and spirit of the nations concerned.[1]

Definition of capture.

Reprisals made by one belligerent of the property of another, pursuant to general hostilities, are denominated CAPTURES.

[1] 1 Kent's Com., 69, 70.

By public and private armed vessels.

Captures are either made by the government vessels-of-war, or by privateers. The law upon the subject of captures is alike applicable to those made by ships-of war and by privateers. The final disposition of the proceeds of a lawful capture varies under varying circumstances, which will be considered hereafter. It is only necessary, in this connection, to review the subject as particularly applicable to letters of marque.

Privateers.

A privateer is a vessel, the property of private individuals, fitted out and equipped at their expense, but specially commissioned, by what are denominated "letters of marque and reprisal," with the principal design of attacking and seizing the vessels and property of the enemy; but also of preventing neutrals from carrying on an illicit trade with the enemy.

The right of making war, as we have seen, is a right appertaining exclusively to the sovereign power of the state; and this right necessarily carries with it, as an incident, that of directing and controlling all its operations.

Their authority, power, and rights.

Private citizens cannot, of themselves, and without commission from the supreme power, take any steps in relation to the perpetration of acts of hostility.

Persons fitting out ships to cruise against the enemy, acquire the property which they capture, either in whole or in part, according to the provisions of the contract made with them, as a compensation for the expenses which they incur and the hazards which they assume; and this property they acquire solely by virtue of the commissions from the sovereign power under which they sail.

Private citizens are under no legal obligation of scrupulously weighing the justice of a war, and indeed have not always the means or opportunity to enable them to do so; they are, therefore, bound to rely upon the judgment of the supreme power of the nation, and may, doubtless, with a safe conscience, serve their country by fitting out privateers. "But," says Vattel, "it is an infamous proceeding on the part of foreigners, to take out commissions from a prince, in order to commit depredations on a nation innocent with respect to them. The thirst of gold is their only inducement, nor can the commission they have received efface the infamy of their conduct, though it screens them from punishment."[1]

Formerly, reprisals were considered lawful, when made by a private subject of a belligerent power, without a commission.

Privateers must be commissioned.

It was not until the fifteenth century that they were considered essential, and that private citizens were forbidden, without license, to fit out vessels to cruise against the enemy. It was about this time that laws to this effect were passed by Germany, France, Spain, and England. It soon became, and until late years uniformly continued to be, the practice of maritime nations, to make use of the voluntary aid of individuals against their enemies, as auxiliary to the public force. Indeed, it is said by Bynkershoek, that the Dutch formerly employed no vessels-of-war but such as were owned by private persons, and to whom the government allowed a portion of the captured property, as well as indemnity from the public treasury. It was held by Sir

[1] Vattel, B. III., c. xv., §§ 223, 229.

Matthew Hale to be an unlawful depredation, in a subject, to attack the enemy's vessels, except in his own defence, without a commission.

Doctrine of courts of United States on this subject.

The subject has undergone frequent discussion in the courts of Great Britain and in the Supreme Court of the United States; and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under commission; but that they may, nevertheless, seize upon hostile property in their own defence. If they commit depredations upon the property of the enemy without a license, they act upon their own peril, and subject themselves to punishment by their own country; but the enemy are, notwithstanding, precluded from treating them as criminals; and as respects the enemy, they violate no rights of capture.[1]

Character of privateering.

The practice of cruising with private armed vessels under government commission, in other words, of privateering, which has been heretofore regarded as a legitimate mode of destruction of the enemy's commerce, by all maritime nations, has been, of late years, arraigned as subject to enormous abuses, as an encouragement of the spirit of lawless depredation, or piracy, and as inconsistent with the humane rules which have been universally adopted in mitigation of the severities of modern warfare.

Considered in conflict with the spirit of the age.

Earnest endeavors have been made, by many philanthropic and enlightened persons, to procure the entire abrogation of the system, as in conflict with the liberal spirit of the age.

[1] *The Haase*, 1 Rob., 286; *The Rebecca*, 1 Rob., 227; *The Amer Parentum*, 1 Rob., 303; *The Twee Gessuster*, 2 Rob., 284; *The Melomane*, 5 Rob., 41; *The Joseph*, 1 Gallis, 545.

History of the efforts of the United States government to put down privateering, as a relic of the private wars of the middle ages.

It has lately been declared, by distinguished peers in the British Parliament, that the system of privateering would have been abolished by *all* the great powers, by the treaty of Paris, which succeeded the war with Russia, but for the objection of the United States, through her representative then at that court. This declaration, though perhaps, literally true, can scarcely be considered ingenuous, inasmuch as it was made without disclosing the fact, which could not have been unknown to those who made it—that the ground of objection of the representative of the United States was, that the proposed treaty prohibition *did not go far enough* to attain the purpose which the well-known policy of the United States government required. A brief review of the efforts which, in this behalf, have heretofore been made by that government, will sufficiently demonstrate this policy.

In the treaty of 1778, between the United States and France, it was stipulated, "That no subject of the most Christian king shall apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the said United States, or any of them, or against the property of any of the inhabitants of any of them, or against the people, subjects, or inhabitants of the United States, or any of them, from any prince or state with which the United States shall be at war; nor shall any citizen, subject, or inhabitant of the United States, or any of them, apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of the most Christian king, or any of them, or the property of any of the inhabitants or

any of them, from any prince or state with which the United States shall be at war; nor shall any citizen, subject, or inhabitant of the said United States, or any of them, apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of the most Christian king, or any of them, or the property of any of them, from any prince or state with which the said king shall be at war; and if any person of either state shall take such commission or letters of marque, he shall be punished as a pirate. It shall not be lawful for any privateers, not belonging to the subjects of the most Christian king, nor citizens of the said United States, who have commission from any other prince or state at enmity with either nation, to fit their ships in the ports of either the one or the other of the aforesaid parties, to sell what they have taken, or in any other way whatsoever to exchange their ships, merchandise, or any other lading, neither shall they be allowed to purchase victuals, except such as shall be necessary for their going to the next port of that prince or state from which they have commissions."

In the message of President Jefferson to Congress, in December, 1805, in referring to the acts of privateers off the American coast, he says: "Some of them are without commissions, some with illegal commissions, others with legal form, but committing piratical acts beyond the authority of their commissions;" and then he proceeds to apprise the Congress that he has equipped a force to capture all vessels of this description and "to bring the offenders in for trial as pirates."

In 1812, eight days after the declaration of war

against Great Britain, the Congress of the United States passed a law, limiting and defining the rights of privateers, and endeavored, as far as practicable, to assimilate them to national vessels.

The first section confers upon the President the power to annul, at pleasure, all licenses or commissions which he might grant under the act of June, 1812.

The second section is as follows: "All persons applying for letters of marque and reprisal, pursuant to the act aforesaid, shall be required to state in writing the name, and description, and tonnage and force of the vessel, and the name and residence of the owner, the intended number of the crew, etc.;" and the third section provides for ample security to be given for the strict and due observance of the treaties and laws of the United States, and of the instructions given them for their conduct; and the remaining sections require the captures which may be made, to be brought into port for adjudication by the court of admiralty; prohibit their sailing without special instructions; compel the commanders to keep regular journals of all that occurs, daily, and transmit them to the government; and impose upon the commanders of public armed vessels the duty of examining these journals when meeting the privateer at sea, and to compel their commanders to obey their instructions, and all this under penalty of forfeiture of all interest in any captures which they may make.

In 1846, during the war between Mexico and the United States, President Polk, in his message to Congress, in December of that year, held the following language:

"Information has been received at the department of state, that the Mexican government has sent to Havana blank commissions to privateers, and blank certificates of naturalization, signed by General Salas, the present head of the Mexican government. There is also reason to apprehend that similar documents have been transmitted to other parts of the world. As the preliminaries required by the practice of civilized nations for commissioning privateers and regulating their conduct, have not been observed, and as these commissions are in blank, to be filled up with the names of citizens and subjects of all nations who may be willing to purchase them, the whole proceeding can only be construed as an invitation to all freebooters to cruise against American commerce.

"It will be for our courts of justice to decide whether, under such circumstances, these Mexican letters of marque and reprisal shall protect those who accept them, and commit robberies upon the high seas under their authority, from the pains and penalties of piracy. If the certificate of naturalization thus granted, be intended to shield Spanish subjects from the guilt and punishment of pirates, under our treaty with Spain, they will certainly prove unavailing."

The laws of the United States, prohibiting the enlistment of American citizens in the service of foreign powers, under severe penalties, are more rigorous than those of any other nation; and the act of April 20th, 1818, among other things, provides that it shall be a misdemeanor for "any citizen of the United States to fit out and arm or to increase or augment the force of any armed vessel,

with intent that such vessel shall be employed in the service of any foreign power at war with another power with whom we are at peace—or be concerned in fitting out any vessel to cruise or commit hostilities against a nation at peace with us." These laws expressly punish by fine and imprisonment, any citizen of the United States, found on board of letters of marque, cruising against the commerce of a neutral power, or who shall leave the American jurisdiction with the intent of being so employed.

In the case decided in the Supreme Court of the United States, already cited in another connection,[1] it was held that "captures made by vessels so illegally fitted out, whether a public or a private armed ship, are tortious—and the original owner is entitled to restitution when brought within our jurisdiction."

But the early policy and disposition of the United States government was fully and eloquently expressed by her distinguished minister, Dr. Franklin, in his language to Mr. Oswald, the British commissioner, in negotiating the treaty of peace of 1783, at the Court of St. James.

"It is," said he, "for the interest of humanity in general, that the occasions of war and the inducements to it should be diminished. If rapine is abolished, one of the encouragements of war is taken away, and peace, therefore, more likely to continue and be lasting. The practice of robbing merchants on the high seas, a remnant of the ancient piracy, though it may be accidentally bene-

[1] *The Santissima Trinidad*, 7 Wheat., 283.

ficial to particular persons, is far from being profitable to all who are engaged in it, or to the nation that authorizes it. In the beginning of a war, some rich ships, not upon their guard, are surprised and taken. This encourages the first adventurers to fit out more armed vessels, and many others do the same. But the enemy, at the same time, become more careful, arm their merchant ships better, and render them not so easy to be taken; they go also more under the protection of convoys. Thus, while the privateers to take them are multiplied, the vessels subject to be taken and the chances of profit are diminished, so that many cruises are made, wherein the expenses overgo the gains, and, as is the case in other lotteries, though some have good prizes, the mass of adventurers are losers—the whole expense of fitting out all privateers during a war, being much greater than the whole amount of goods taken. Then there is the national loss of all the labor of so many men, during the time they have been employed in robbing, who, besides spending what they get in riot, drunkenness and debauchery, lose their habits of industry, are rarely fit for any sober business after peace, and serve only to increase the number of highwaymen and housebreakers. Even the undertakers who have been fortunate, are, by sudden wealth, led into expensive living, the habits of which continue when the means of supporting it cease, and finally ruin them—a just punishment for their having wantonly and unfeelingly ruined many honest, innocent traders and families, whose subsistence was obtained in serving the common interests of mankind."

Pursuant to the policy thus early announced, treaties have been made by the United States with many foreign powers, by which it has been agreed that if the subjects of either party take letters of marque from the enemies of the other, they shall be considered and punished as *pirates*—such is the treaty made with France in 1778; with the Netherlands in 1782; with Sweden in 1783; with Prussia in 1785, and again in 1789; with Great Britain in 1795; with Spain in 1795; with Central America in 1825; and with Colombia in 1824.

The learned compilers of the latest English work on the law of maritime warfare very candidly declare, and the justice of the observation is patent to all familiar with the diplomatic history of the United States: "The government of the United States has the merit of having been the first power in modern times, which has endeavored to put down this relic of the private wars which disgraced the middle ages."[1]

Some of the general principles established in the law of capture will be here stated, but will be more fully considered in that portion of this treatise devoted to the subject of prize jurisdiction and proceedings.

Revocation of commission of privateers.

The commission of a privateer is always taken subject to the power which grants it. It may be vacated either by express revocation, with or without cause, by a cessation of hostilities between the nations which they affect, or by the misconduct of the grantees.[2]

[1] Hazlitt & Roche's Manual of the Law of Maritime Warfare, 104.

[2] *The Mariamne*, 5 Rob., 9; *The Thomas Gibbons*, 8 Cranch, 421.

Validity of capture not affected by captor being alien enemy.

The validity of a capture made by a privateer, is not affected by the fact that the master is an alien enemy, although the effect of that might be the condemnation to the government of what otherwise would have been his interest in the prize. The owners and crew are as much parties in a prize court as the captain, and his national character can in no manner affect their rights.[1]

Distinction between privateers and letters of marque.

There is a distinction between a privateer and a letter of marque in this, that the former are always equipped for the sole purpose of war, while the latter may be a merchantman, uniting the purposes of commerce to those of capture. In popular language, however, all private vessels commissioned for hostile purposes, upon the enemy's property, are called letters of marque.

A ship furnished with letters of marque is deemed a ship of war. Lord Stowell says: "A ship furnished with a letter of marque is manifestly a ship of war, and is not otherwise to be considered because she acted also in a commercial capacity. The mercantile character being superadded, does not predominate over or take away the other."[2]

Registered owner of privateer person liable.

As to the claims of British subjects, it has been held that the person whose name appears on the register of the privateer, must be regarded as the owner.

Rule not applicable to foreigners.

But foreigners are not affected by this limitation, and may sustain a claim against any *bona fide* owner whose name does not appear on the register.

In the case deciding this point,[3] Lord Stowell says: "It appears that Mr. Parry was actively and

[1] *The Mary and Susan*, 1 Wheat., 46.

[2] *The Fanny*, 1 Dodson, 448.

[3] *The Neustra Senora de los Dolores*, 1 Dodson, 290.

directly concerned in the purchase and outfit of this vessel, and that the appointment of the master took place under his directions. There is a series of letters, too, which show that he continued afterward to bestow his time and attention in the management of this property, as property in which he was interested. Nothing, therefore, can be more clear than that he is to be considered as a proprietor, and that he would, in all justice, be entitled to the benefit which might be acquired in that character, and consequently that he must be responsible for all the loss that may be sustained. Mr. Parry, having contributed his money in the purchase and outfit of the vessel, had a legal right to have his name inserted in the register, and he can have no right to plead his own *laches* in order to relieve himself from a claim."

Liability of owners of privateers.

It is well settled that the owners of a privateer are liable for any injury which, either through ignorance or illegality, has been inflicted either by the officers or crew, in the execution of the business of their employment. But when that business is departed from, by a violation or excess of orders, and injuries result in consequence, the owner is not liable.

Basis of Liability.

There must be a capture, as prize of war, as the basis of the owner's responsibility, except to the amount of the bond given on receipt of the commission and the forfeiture of the vessel. To this extent the owners are liable, even for a piratical seizure and spoliation.[1]

Limitation of liability.

But where, in the performance of legitimate acts,

[1] *Dias* vs. *The Revenge*, 3 Washington, 262.

the master or crew commit acts of outrage in excess of their authority, the owners are liable to the full value of the property injured or destroyed, though not to damages for the loss of a voyage; the principle being, to absolve the owners from liability to vindictive damage for trespasses committed by a crew.[1]

Although a captor, in the destruction of property which he has taken, acts under a sense of duty to his government, this does not make him any the less liable to the fullest extent, to the claimant. In such a case the captor must seek his indemnification from his government.[2]

Owners liable jointly and severally.

The owners of a privateer are liable *in solido;* and a joint-owner cannot absolve himself by showing compensation to the extent of his proportionate interest.[3]

A sentence of condemnation by a prize court is absolutely essential, in all cases, to complete the transfer of title to maritime prizes from the original owners to the captors. So that, if a ship be taken by a privateer and not carried into port and condemned, the captors acquire no property in the prize, and can confer no property whatever upon a purchaser.[4]

Privateers not considered private property on capitulation.

Privateers are not considered within the terms of a capitulation, by the provisions of which private property generally is to be protected. The *Dash*, carrying sixteen guns, with tackle, bolts, &c., was taken possession of, with two others, in the harbor

[1] The *Amiable Nancy*, 1 Paine, 111.

[2] *The Acteon*, 2 Dodson, 48.

[3] 5 Rob. 291.

[4] 15 Vin. Ab., 57.

of Browershaven, after the surrender of Walcheren, in virtue of orders from Commodore Owen, commanding a division of his majesty's ships engaged in the expedition. A claim was made on behalf of Minter & Co., of Browershaven, for this vessel, under the second article of capitulation, by which it was agreed that "all private property should be protected." Lord Stowell said: "Privateers are private property in one sense; but they have, at the same time, a public character impressed upon them by their employment; though they are private property, they are still private property employed in the public service."[1]

Limitation of authority of letters of marque by law of nations.

By the law of nations, letters of marque or reprisal will not authorize the molestation of embassadors, nor of those who travel for religion, nor of students, scholars, or their books.

Legality of capture may depend on government orders.

The legality of a capture may exclusively depend upon the orders or ordinances of the governments of the captors; and where captures are made pursuant to such orders, though manifestly in violation of neutral rights and the law of nations (as in the case of the Berlin and Milan decrees, or the orders in council of 1812), they must be deemed, as to the captors, as rightful; and although a tribunal of prize might not lend its aid to enforce such captures, it would probably be bound to abstain from obstructing the captors.[2]

Intention to seize requisite to a valid capture.

To constitute a valid capture, there must always be some act done manifesting the intention to seize and retain the prize; but such intention may be

[1] 1 Edwards, 271.

[2] *Le Maissonnaire et als.* vs. *Keating*, 2 Gallison, 334.

a proper inference from the conduct of the captor.[1]

A capture in neutral waters valid as between belligerents.

A capture made within neutral waters, is deemed a rightful capture, as between belligerents. The neutral power may question its validity; and as to him, it is considered void, unless, both ships being in neutral waters, the captured vessel commences hostilities upon the other; in such case, the neutral protection is forfeited, and a capture ensuing, it is to be considered rightful, even as against the neutral.[2]

Question of time of capture considered. And whether actual possession necessary.

As to the question when, in point of time, property seized is vested in the captors, there is no other uniform rule among nations than that which requires firm and secure possession. As to what constitutes such possession, there is considerable diversity.[3]

"The first question," says Lord Stowell, in the first case here cited, "that will occur, refers to the time of the capture—whether that is to be dated from the actual taking possession, or the previous striking of colors; and I think that the striking of the colors is to be deemed the real *deditio*. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking possession must have been alone considered; but as that attempt failed, I am of opinion that the act of formal submission, having never been effectively discontinued, must be deemed the consummation of the capture; and if so, the next question will be, where was the vessel at the time this act took place? and this is proved to have been 'when she

[1] *The Grotius*, 9 Cranch., 368.

[2] *The Anne*, 3 Wheaton, 435.

[3] *The Santa Cruz*, 1 Rob., 50; *The Rebeccah*, 1 Rob., 233.

was about to go into the road to anchor there'; for such is the expression of the witness upon the third interrogatory, which points more immediately to the place of capture; although on the nineteenth, which is pointed only to the general course of the vessel on her voyage, he says: 'She put into the road there.' The second witness describes her as merely 'passing by the Isle of Marcon at the time;' and the third says, in the language of the first, that 'she was about to go into the road to anchor there.' Clearly, by all these descriptions, she had not entered the road; and she was under sail at the time she struck her colors. In point of locality, then, the claim of the admiral is not founded, for she was not *in ipsis faucibus*. She was about to enter, but was not actually entering; and that is the point at which the admiralty right commences."

A vessel was captured at Barbadoes, and the captors having returned the ship's papers, intimated to the captain that he had better follow him to Antigua. On the following day the captors took bodily possession, and it was held that the seizure made at Barbadoes was continued throughout, and the actual possession on the second day was not to be regarded as a fresh seizure.[1]

To constitute a capture, so as to occasion a recapture, no actual possession need be taken.

A vessel was ordered to lie-to by a French lugger, calling herself a privateer, but by reason of the boisterous weather, no man was sent on board. Lord Stowell said: "I can by no means agree to what has been advanced in the argument that it

[1] *The Hercules*, 2 Dod., 363.

was on this account no capture. The sending of a prize-master on board is an overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie-to, and obey the direction of the French lugger, and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist and no prospect of escape. There have been many instances of capture where no man has been put on board, as in ships driven on shore and into port. I remember particularly, a famous case of a British vessel, armed with two swivels, which took a French privateer row-boat from Dunkirk. Having only three men on board, and only armed with the swivels, she was afraid to board the row-boat, which was full of men armed with muskets and cutlasses—but by the terror of her swivels she compelled their submission, and obliged them to go into the port of Ostend, then the port of an ally, she following them all the way at a proper distance."[1]

A privateer, finding enemy's property on board a neutral vessel, put two men on board, and the master of the vessel promised to proceed into a port of the captain, without resistance to the force put in his possession. It was held that the capture was sufficient, as against the claim of another privateer of like commission as the first, who captured the vessel on finding her proceeding to the port of an enemy.[2]

"Though the privateer," said Lord Stowell, "had no right to compel such an engagement, if the neu-

[1] *The Hercules*, ubi sup.; *La Esperanza*, 1 Haggard, 91.
[2] *The Resolution*, 6 Rob., 13.

tral master voluntarily promised to go into the British port, without more force being put upon him, I am of opinion that the act of seizure, under such circumstances, would be fully sufficient in law to constitute a capture. The engagement being made, the neutral nation sustains no injury from it, and it is fully competent for the master of the privateer to act under it. It is a mere question of prudence, whether he will trust to the word of the neutral master, or whether he will take the more effectual precaution of putting an adequate force on board."

But if one privateer takes a vessel, and afterward abandon her, and then another takes the same vessel, the last seizor is, in law, the only captor, and the act of a commander in relinquishing that which would otherwise have been good prize, to himself and his crew, is binding upon the interests of all under him. Commenting upon the circumstances of a case like this, Lord Stowell says: "As it is impossible that the claims should coexist, the court is bound to decide upon them according to their legal merits, which must depend upon this question—which of them was the actual captor? That is, not only who was the person by whom the seizure was actually made, but which is the party legally entitled to the character of captor; for there may be many successive captors, but only one can be legally entitled, as captor, to the benefit of the prize. If a captor dismisses what he has seized upon, the interest of himself and all under him is concluded by this act, and the same vessel lies open to seizure by any other captor who may exercise a similar discretion."[1]

[1] *The Diligentia*, 1 Dod., 404; *vide* also *The Woodbridge*, 1 Haggard, 74.

An officer placed in possession of a vessel captured by a national vessel, by the captor, may not be dispossessed by the officer of another national vessel for the purpose of enabling the latter to make a capture for his own use and benefit.[1]

If a neutral vessel be captured by a superior force, and a small force be placed on board her with a prize-master to carry her into port, it is not the duty of the master and crew of the captured vessel to attempt to effect a rescue, for, by doing so, they subject the vessel to condemnation, which would otherwise be entitled to restitution.[2]

Liability for mistakes in engagements of friendly vessels.

If two armed ships should meet upon the ocean, and under mutual mistake, and without any want of reasonable care, should go into an engagement, neither would be liable to the other for any injury resulting from the combat. But if an attack were wanton, or in consequence of gross negligence on the part of either, it would subject the offending party to liability for the most ample remuneration.[3]

Lawful captures can only be made by public armed vessels or private armed vessels commissioned.

Lawful captures can only be made by national vessels of war, or vessels commissioned for that purpose. A seizure was made by a hired armed revenue cutter, said to have been placed under the command of *The Euridice* man-of-war as a tender.

"In order to support that averment," said Lord Stowell, "it must be shown, either that there has been some express designation of her in that character, by the orders of the admiralty, or that there has been a constant employment and occupation,

[1] *The Eagle*, 1 W. Rob., 245.

[2] *The Short Staple* vs. *The United States*, 9 Cranch, 55.

[3] *The Marianna Flora*, 3 Mason, 116.

in a manner peculiar to tenders, equivalent to an express designation, and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable."[1]

In another case, a capture was made by a revenue cutter, which had been fitted out as a tender by the captain of a man-of-war, and put in command of a midshipman, and manned by a crew from the man-of-war, but without any commission or order from the admiralty.[2]

"It is not to be maintained," says Lord Stowell, in his opinion in this case, "that an officer, by putting his men on board, can constitute a ship to be a part of the navy of Great Britain. Such a character is not to be impressed without the intervention of some public authority. If the contrary could be held, this must follow, that an officer of a large ship might form out of these tenders as many ships of war as he pleased — he might compose a fleet. Whatever may have been the case in remote stations—where the principal persons in command must necessarily be intrusted with a greater latitude of discretion—at home, where an officer has it in his power instantly to refer to the admiralty, the case is very different."

Unless the commission so granted by the commander, be afterward confirmed by the admiralty, the prize is condemned as a *droit* of admiralty.

Capture by boats belonging to men-of-war.

In cases however of boats belonging to men-of-war, and employed in effecting a capture, Lord Stowell said: "The court would certainly be disposed to extend, as far as it could, with propriety,

[1] *The Charlotte*, 5 Rob. [2] *The Melomane*, 5 Rob., 50.

to ships of war, the benefit of captures made by their boats acting distinctly in that capacity. There must be situations in which the captures could not otherwise be made, and many considerations of convenience require that they should be allowed to take, in whatever manner their judgments may deem expedient, according to the circumstances of the case, either by their whole force, or by a part detached on that particular service. The court would therefore not be disposed to narrow the legal effect of the operation of their boat's crew."[1]

Restitution no bar to second capture

The voluntary restitution of a prize, does not bar a second seizure by other parties, either on the same or on other evidence, but such second capture is made at the peril of being subjected to costs and damages as made against the presumption of illegality resulting from the first restitution.[2]

A ship, although incapable of going out upon a cruise, may nevertheless, make an effectual capture by her boats.

"It is not to be said," says the learned court, in a case in which this question arose, "that because the ship was incapable of going out on a cruise, that therefore she could not make a seizure in port. She had arms which she could stretch out for such a purpose. She had her boats, which might be employed on a service of this kind. Is the court in every case, to enter upon a consideration of the exact state and condition of the ship by which a

[1] *The Charlotte*, ubi supra; *vide* also *The Donna Barbara*, 2 Haggard, 373.

[2] *The Mercurius*, 1 Rob., 80; *vide* also *The Woodbridge*, 1 Haggard, 74.

seizure is effected. Suppose the vessel is in dock and undergoing repairs, the circumstance would not suspend the right of the officer in command of her, to act by himself and men, in boats. The seizure may be legally effected by means of boats, or indeed, without them, by a mere summons to the parties."[1]

Lawful capture may be made by ship employed in convoy.

A lawful capture may be made by a ship employed in the convoy of merchantmen, provided it is done without a desertion of the convoying duty.

Upon this question, the rule is thus stated by Lord Stowell; "The first and great object of the attention of an officer appointed to a service of this kind, is the care of his convoy. He is not at liberty to desert it for the purpose of acquiring any advantage to himself, nor is he to volunteer any attack upon the enemy, if it takes him away from his first great duty. But, as far as it is consistent with that duty, he may pursue his own interest, and may attack and annoy the enemy, in any way that may appear to him advantageous. He may capture the ships and goods of the enemy, provided he does not withdraw himself from the duty of protecting the vessels under his care, and may take the benefit of prizes which he has the good fortune to make.

There is no pretence for saying, that a convoying ship may not legally and effectually make a prize as well as any other of his majesty's ships—nor is there more objection in the case of a convoying ship to constructive than to actual capture. A convoying ship is no more disabled from rendering assist-

[1] *The Charlotte*, 1 Dodson, 220.

ance to others, than from making an actual capture herself. The service on which she is employed makes no disqualification in either case, supposing only that the capture can be effected without any breach of the principal duty, the care of the convoy."[1]

Wrong-doer only liable for injury resulting from a capture.

Where a wrong is committed in a capture, the wrong-doer is the only person who is responsible for the injuries resulting therefrom.

After the cessation of hostilities between the United States and Great Britain, in 1783, but before the fact of such cessation had come to the knowledge of parties in the United States, *The Mentor*, an American ship, was destroyed, while off the Delaware, by *The Centurion* and *Vulture*, two British ships-of-war, part of the squadron of Admiral Digby. In 1799, this was made the subject of a suit against Admiral Digby, in the admiralty court in England.

In rendering judgment in this case, Lord Stowell says: "It is an entire novelty in a prize cause, to call to adjudication, not the immediate alleged wrong-doer, but a person who was neither present at, nor cognizant of the transaction, and who is to be affected in responsibility merely on this ground—that the person alleged to have done the injury was acting under his general authority; for, as to particular orders applied to this transaction, it is not pretended that any were given, or could be given. He was only the admiral on the station, and the ships which committed the alleged outrage, were

[1] *The Galen*, Dodson, 429–440.

under his general command, but at a great distance from him.

"This is the first time that an attempt has been made in a prize cause, to pass over the person from whom the alleged injury has been received, and to fix it on another person, on the ground of a remote and consequential responsibility. The actual wrong-doer is the man to answer in judgment. To him responsibility is attached in this court. He may have other persons responsible over to him, and that responsibility may be enforced. As, for instance, if a captain made a wrong seizure, under the express orders of the admiral, that admiral may be made responsible in the damages occasioned to the captain by that improper act; but it is the constant practice of this court to have the actual wrong-doer the party before the court; and every man must see the propriety of that practice, because, if the court was once to open the door to complaints founded on a remote and consequential responsibility, where is it to stop? If a monition is to go against the admiral for not issuing his revocatory orders, a monition might, in like manner, go against the lords of the admiralty for a similar neglect, or against the secretary for not issuing a similar direction to the lords of the admiralty; and these persons might be made parties in a prize cause, and called upon to proceed to adjudication.

"If the legal responsibility is to be shifted from the actual captor, to whom is the claimant to look? Where is he to find the responsibility in the chain of persons who may be, somehow or other, involved in the different stages of the transaction? Where is he to find the wrong-doer, if you once take off

that character from the person who immediately commits the injury? Where is he to resort, if you take from him that easy and direct resort, with which, in the present understanding of the law, he is provided? I am most clearly, on this ground, of opinion, that Admiral Digby alone cannot be compelled to proceed to adjudication under this monition. The loss which the claimant has sustained is extremely to be lamented; but I cannot give relief on mere grounds of humanity.

"Humanity is only the second virtue of courts Justice is unquestionably the first; and justice would be grossly violated by providing relief for one innocent man at the expense of another, who is not legally subject thereto."[1]

Vindictive damages given only in extraordinary cases.

Vindictive damages are never given in cases of illegal capture, unless the misconduct has been gross, and wholly without excuse or palliation. Much indulgence is extended to errors, and even to improprieties of captors, where no malignity or cruelty is justly chargeable.[2]

If a captor destroy a ship which is protected by the license of his government, he or his government is responsible for the loss occasioned by such destruction.[3]

But a captor is protected by the court, who acts in good faith in pursuance of his rights, in an ignorance, honest and invincible on his part, of a for-

[1] *The Mentor*, 1 Rob., 180; *vide* also *The Faderlandt*, 5 Rob., 123.

[2] *The Lively and cargo*, 1 Gall., 29; *The Anne*, 3 Wheat., 435; *The George*, 1 Mason, 24.

[3] *The Felicity*, 2 Dod., 381; *The Actæon*, ib., 52.

eign fact, not governed by his own domestic law, with which he is unavoidably unacquainted till it is actually communicated to him.[1]

Prize subject to visible and immediate incumbrances only.

It is a general rule that the captor takes his prize *cum onere*, but the *onus* must be one which is immediately and visibly incumbent.

Thus, if a captor take the cargo of an enemy on board the ship of a friend, he takes it subject to the liability for freight due to the owner of the ship, because by the general law of merchants, the cargo in the possession of the owner is subject to that liability, independent of contract. But to claims which rest in action merely, such as bottomry bonds, liens by contract, etc., the rule has no application—for these are claims which no admiralty court can examine with effect. The captor has no access to the original private understandings of the parties by whom such contracts are made, and it is therefore held that he should not be affected by them. Several cases have been decided, involving this principle, relating to freight, liens, etc., both in England and the United States.[2]

Prize must be sent to convenient port.

The captor must send his prize to some convenient port for adjudication. Although some latitude is necessarily allowed in the selection of the port, the captor cannot exercise an arbitrary discretion; it must be a convenient port, and it is the duty of

Rule as to this.

[1] *The John*, 2 Dodson, 339.

[2] *The Tobago*, 5 Rob., 218; *The Diana*, ib., 67; *The Twilhieg Rigct*, 5 Rob., 82; *The Marianna*, 6 Rob., 24; *The Constancia Harlasten*, 1 Edw., 252; *The Ann Green*, 1 Gall., 293; *The Francis*, 8 Cranch, 418.

the captor to regard the convenience of the claimant in proceeding to adjudication.[1]

Where it is not possible to bring the enemy's property into port, and it is beyond all doubt the property of the enemy, the captor's duty is to destroy it; where a reasonable doubt exists as to the character of the property, the more safe and proper course is to dismiss it.[2]

Until an adjudication, captors have no right to convert the property, nor even to break bulk. In cases, however, of an overruling necessity, as in the case of a capture of perishing property in a distant part of the world, the rule is necessarily relaxed, and the property may be sold.[3]

Duty on arrival.

On arrival at the port, it is the duty of the captors forthwith to deliver, upon oath, into the registry of the court, all papers found on board the captured ship.[4]

It is also their duty to bring on the prize crew, or at least the master and principal officers, with the prize, for adjudication.[5]

To proceed forthwith to adjudication.

With all practicable celerity, the captors are bound to proceed to adjudication. Demurrage, damage and compensation have been frequently awarded on the ground of unreasonable delays in the proceedings of the captors.[6]

[1] *The Wilhelmsburg*, 5 Rob., 143; *The Washington*, 6 Rob., 275; *The Lively*, 1 Gall., 318.

[2] *The Felicity*, ubi supra.

[3] *L'Eole*, 6 Rob., 220.

[4] *The Diana*, 2 Gall., 95.

[5] *The Bothnea and the Janstoff*, 2 Gall., 88.

[6] *The Madonna del Burso*, 4 Rob., 169; *The San Juan Battista* and *The Purissima Conception*, 5 Rob., 38; *The Corier Maritima*, 1 Rob., 287; *The Susanna*, 6 Rob., 51.

"Unless the captor," says Lord Stowell, in the first case here cited, "can exculpate himself with respect to the delay in this matter, he is guilty of no inconsiderable breach of duty. It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of our own, if any persons, commissioned or non-commissioned, could lay their hands on valuable foreign ships and cargoes, without bringing such act to judicial notice with promptitude."

Prize-master and crew.

It is the duty of the captor immediately to commit the prize to the care of a competent prize-master and crew, not for the reason that the prize or original crew, when left on board in the case of a seizure of a citizen or neutral, are released from their duty without the assent of the master, but because the captured crew are not subject to the authority of the captor's officer.[1]

The right to capture enemy's property on board a neutral ship, and neutral property on board an enemy's ship, has been the subject of discussion by the elementary writers, and has frequently been passed upon by the courts both of the United States and Great Britain.

Although a subject connected with that of capture, it may be more properly reviewed when we come to consider the effect of war upon the commerce of neutrals.

Besides the capture *de facto*, which we have been considering, there is another capture, by construction, or joint-capture. Joint-captors are those who,

[1] *The Eleanor*, 2 Wheat., 345.

"not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captors, or intimidation to the enemy."

Who are entitled to be considered joint-captors is a question of exceeding interest and importance. Like most other questions in the law of nations, as affecting commercial interests during war, it will be found nowhere so learnedly considered and illustrated as by the invaluable opinions of that great luminary of this law—Lord Stowell.

Doctrine of constructive assistance discussed.

He says:[1] "The benefit of prize is given *to the takers*, by which term are naturally to be understood those *who actually take possession*, or those affording an actual contribution of effort to that event; either of these persons is naturally included under the denomination of *takers*, but the courts of law have extended the term *takers* to another description of persons; to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy. Capture must therefore be divided into capture *de facto* and capture by construction.

"Capture by construction must remain on the terms the law has already recognized, and not a new unauthorized construction—for as the word has already traveled a considerable way beyond the meaning of the act of Parliament, the disposition of the court will be, not to extend it still further, but to narrow it and bring it nearer to the terms of the act than has been done in former cases.

[1] *The Vryheid*, 2 Rob., 21.

The case of the *Mars* is a strong authority in point, in which the claim to joint-capture was not allowed to ships not in company, but stationed at different outlets to watch for the enemy, who were known to be under the necessity of passing through one of them.

"In all cases, the *onus probandi* lies on those setting up the construction, because they are not persons strictly within the words of the act, but let in only by the interpretation of those having authority to interpret it. It lies with the claimants in joint-capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or to show some principle in their favor so clearly recognized and established as to have become almost a first principle in cases of this nature.

Vessels in sight.

"The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint-captors, that where that fact is alleged, we do not call for particular cases to authorize the claim—but where that circumstance is wanting, it is incumbent on the party to make out his claim, by an appeal to decided cases, or at least to principles, which are fairly to be extracted from these cases."

The Vestal frigate claimed to share in the proceeds of the capture of the Dutch fleet by Captain Trollope, in October, 1798, on the ground that although not taking part, or even in sight of the engagement, she was one of the ships under the captor's command on that station, and was only absent on the occasion, in consequence having been dispatched by him on a special mission.

In disallowing the claim, Lord Stowell said:

"There are no cases cited as being directly in point, but the case of *The Senor San Josef* (House of Lords, May 4, 1784), has been alluded to. That is a case which I perfectly recollect—having been concerned in arguing it—but it was, in its principal circumstances, entirely different from the present case. That was a case of two vessels detached from the fleet, under the command of Admiral Pigot, in the West Indies, to chase two strange ships appearing in sight, the fleet bearing up all the time as fast as possible to support them. The chasing vessels took the two ships first appearing, and also a third, on which the dispute arose. There was much contrariety of evidence whether the fleet, which was continuing to sail in the same direction, was not up and in sight, and the chief doubt arose owing to the night coming on, for if it had been day, the fleet would clearly have been in sight, and it was at all events known to be at hand, and ready to have given any support that might be wanting. Under these circumstances, the Court of Appeals affirmed the sentence of the court below, pronouncing for joint-capture—and in that sentence it is, I believe, true, as it has been stated by the counsel, that some mention was made of the words *joint-enterprise.* But, taking the case together, it can by no means be said to go the length of the present claim.

"As far as cases go, then, there is an entire failure of authority on the part of *The Vestal.* But the usage of the navy has been resorted to, and a case has been cited of *The Audacious*, one of the fleet under command of Lord Howe, being permitted to share in the victory of the first of June, 1794.

"It is admitted, and it is certainly true, that the

practice of the navy, in opposition to the words of the act of Parliament, or a proclamation, or to the established law, cannot weigh or be of any authority.

"At the same time, the court would be extremely unwilling to break in on any settled and received notions of the navy, or to disturb a practice generally prevailing among themselves. But the case cited is different from the present. *The Audacious* had actually engaged in the enemy's fleet, and had separated only in chase of one of their ships.

"*The Canada*, another case which has been mentioned, chased from the fleet, on signal, on the prize coming in sight. *The Lawestoff*, which is another case stated to have happened in the Mediterranean, was not detached from the Mediterranean fleet till after the chase had actually begun.

"The circumstances, therefore, materially distinguish these cases from the present; and I am at liberty to say, that no case in point or authority has been produced. Is there, then, any admitted principle? The gentlemen have resorted to the general principle of common enterprise, and it has been contended that, where ships are associated in a common enterprise, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made; but certainly that cannot be maintained to the full extent of these terms. Many cases might be stated in which ships so associated would not share. Suppose a case that ships, going out on the same enterprise, and using all their endeavors to effectuate their purpose, should be separated by storm or otherwise, who would contend that they should share in each other's captures?

There is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing. It cannot be laid down to that extent; and, indeed, it would be extremely incommodious that it should. Nothing is more difficult than to say precisely where a common enterprise begins. In a more enlarged sense, the whole navy of England may be said to be contributing in the joint-enterprise of annoying the enemy. In particular expeditions, every service has its divisions and subdivisions. Operations are to be begun and conducted at different places. In the attack of an island, there may be different ports, and different fortresses, and different ships of the enemy lying before them.

"It may be necessary to make the attack on the opposite side of the island, or to associate other neighboring islands as objects of the same attack. The difficulty is, to say where the joint-enterprise actually begins. Again, is it every remote contribution, given with intention or without intention, that is sufficient? I apprehend that is not to be maintained. An actual service may be done without intention; or there may be a general intention to assist, and yet no actual assistance given. Can anybody say that a mere intention to assist, without actual assistance, though acted upon with the most prompt activity, would, in all cases, be sufficient? If persons, under such claims, could share, there would be no end to dispute. No captor would know what he was about; whether, in every prize he made, there might not be some one, fifty leagues distant, working very hard to come up, and even acting under the authority of the admiralty,

to co-operate with him. In serving his country, every captor would be left in uncertainty, whether some person whom he never saw, and whom the enemy never saw, might not be entitled to share with him in the rewards of his labor. The great intent of prize is to stimulate the present contest, and to encourage men to encounter present fatigue and present danger; an effect which would be infinitely weakened if it were known that there might be those not present, and not concerned in the danger, who would entitle themselves to share.

"What is the true criterion in these cases? The being in sight, or seeing the enemy accidentally a day or two before, will not be sufficient; it must be, at the commencement of the engagement, either in the act of chasing, or in preparation for chase, or afterward, during its continuance. If a ship was detached, in sight of the enemy, and under preparation for chase, I should have no hesitation in saying she ought to share. But if she was sent away after the enemy had been descried, but before any preparations for chase, or any hostile movements had taken place, I think it would be otherwise. There must be some actual contribution of endeavor, as well as a general intention."

Doctrine of constructive assistance as between public and private armed vessels. The rule laid down.

The ship *Odin* was captured off St. Helena by boats sent from the British ship of war *The Trusty*. A claim to share in the proceeds of the prize was made on behalf of *The Royal Admiral*, a private ship of war, on the ground that her boats, which had been sent out from the harbor of St. Helena to aid in effecting the capture, were in sight when the capture was in fact made by the boats from *The Trusty*.

Lord Stowell said: "I know of no case that would sustain such a claim. The principle of constructive assistance has been thought to have been carried somewhat far, and the later inclination of courts of justice has been rather to restrain than extend the rule. Between private ships of war and king's ships, the rule of law has been always held more strictly, and it has not been the doctrine of the admiralty to raise constructive assistance so easily between them as between king's ships. If the competition had been between two king's ships, it would, in my opinion, be highly questionable, whether a boat so sent out, could support a claim to share, on the mere principle of being in sight. There is, I think, a very solid ground of distinction between the claims of a boat in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs, has done, by means of this boat, all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of a friend, from a ship of war being seen, or within sight of a capture, applies very weakly to the case of a boat, an object that attracts little notice upon the water, and whose character, even if discerned by either of the parties, may be totally unknown to both.

"More unreasonable still would this be upon actual captors, if the constructive co-operation of such an object would give an interest to the entire ship to which it belonged. Where a ship is in sight, she is conceived to co-operate in the proportion of her force. But what room is there for such

a presumption where she co-operates only by the force of her boat?

"I am of opinion, both on principle and authority, that where no antecedent agreement is proved to have taken place, a vessel lying in harbor, cannot be entitled to share in a capture made out of the harbor, by the circumstance of her boat being merely in sight."[1]

The rule.

The distinction between public and private armed ships of war with reference to claims as joint-captors, alluded to by Lord Stowell in the case of *The Odin*, is more distinctly laid down by him in another case, in which the claim was made on the part of two privateers, *The Lark* and *General Coote*, to share in the prize of the public ship of war *The Gannet*.[2] He says:

"The rule of law on this subject, which has long been established in this court and the Court of Appeals in various cases, is, that it must be shown on the part of the privateers that they were constructively assisting.

"The being in sight is not sufficient with respect to them, to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war, from views of private advantage only. They are not bound to put their commissions in use on every discovery of the enemy, and therefore the law does not presume in their favor, from the mere circumstance of being in sight, that they were

The reasons of the rule.

[1] *The Odin*, 4 Rob., 318; *vide* also *La Belle Coquette*, 1 Dod., 18; *The Nancy*, 4 Rob., 327; *The Vryheid*, 2 Rob., 16; *The Niemen*, 1 Dod., 16.

[2] *The Amitie*, 6 Rob., 261.

there with a design of contributing, assisting, and engaging in the contest. There must be the *animus capiendi*, demonstrated by some overt act, by some variation of conduct, which would not have taken place but with reference to that particular object, and if the intention of acting against the enemy had not been effectually entertained."

Again, in another case,[1] with reference to king's ships, Lord Stowell said:

"They are under a constant obligation to attack the enemy wherever seen; a neglect of duty is not to be presumed, and therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised, that they are there, *animo capiendi*. In the case of privateers, the law does not give them the benefit of the same presumption. Ships of this description go out very much on speculation of private advantage, which, combined with other considerations of public policy, are undoubtedly very allowable, but which do not lead to the same inference, as that which the law constructs on the known duty imposed on king's ships. A privateer is under no obligation to attack all she meets, but acts altogether on views of private advantage. She may not be disposed to engage in every contest, and therefore the presumption does not arise in any instance, that she is present *animo capiendi*.

"*A contrary route*, if proved, would defeat the claim of a king's ship, but if nothing appears on the one side or the other, as to that fact, the mere presence would, I think, be sufficient to entitle the king's ship to the character of a constructive captor."

[1] *La Flore*, 5 Rob., 268.

A case already cited,[1] establishes the principle, that in a case of joint-capture, grounded on the being in sight, it is necessary that the claiming vessel should have been seen by the actual captor, and also by the captured vessel, one of which facts, must be established by evidence other than that of the claiming vessel, and the other by implication and necessary inference.

Joint-enterprise as affecting question of constructive assistance.

When two vessels are associated for the purpose of effecting a capture, the continuance of the chase is sufficient to give the right of joint-capture, and the being in sight at the time of the capture is, under such circumstances, not essential.[2]

It has been determined also, that ships are entitled as joint-captors, that have been in chase during the day, and continuing the pursuit in a proper direction, that is, in the direction taken by the prize, although prevented by darkness from seeing the actual capture, or by the thickness of an intervening fog, or an interposing headland, at the moment of surrender, because the impulse and impression in the mind of the enemy who is to be intimidated, or of the friend who is to be encouraged, continue in full force, and thus support the principle on which the doctrine of constructive assistance is based.[3]

As to rights of revenue-cutters to be joint-captors, in a case involving the question,[4] Lord Stowell says:

Rights of revenue-cutters as joint-captors.

"It is a known rule of law, that the mere fact of being in sight would be sufficient to entitle a

[1] *The Faderlandt*, 5 Rob., 120. *L'Etoile*, 2 Dodson, 106.
[2] *The Forsigheid*, 3 Rob., 316.
[3] *The Bellona*, 1 Edw., 64.

king's ship, because in ships fitted out by the state, for the express purpose of cruising against the enemy, the *animus capiendi* is always presumed — but this presumption does not extend to privateers. In the one case, the duty is obligatory, in the other where private individuals make captures at their own expense, they are engaged in a mere commercial speculation, to be carried into effect by military means, but dependent upon their own will in the particular acts and exercises of their authority. Although they are authorized they are not commanded to capture. It is a matter in which they are left to their own discretion. But these vessels employed in the service of the revenue, are a class of ships of an anomalous kind, partaking in some degree of both characters. They belong to the government, and are maintained at the public expense, but not for the purpose of making captures from the enemy. On the other hand, they have commissions of war, but these are private commissions, which impose no peculiar duties upon them. They are not bound to attack and pursue the enemy more than other private ships of war—and they are likewise unfavorably distinguished in this respect—that the advantages of capture are not held out to them, the interest in all captures made by them being reserved to the crown.

"Primarily, their duty is to protect the revenue, and the capture of the enemy's vessels is engrafted on the original character. All they derive from these commissions, is, an authority to attack the enemy, in addition to other authorities that belong to their original and proper employment; on princi-

ple, therefore, they can only be considered as private ships of war.

"They are under no injunction to cruise against the enemy, and are employed generally for fiscal purposes. It is true that there is the addition of a military commission in time of war; but that does not designate them anew, it merely puts them on a footing with other private ships of war."

A private ship of war made claim as joint-captors to share in the prize of a valuable Spanish galleon, taken by *The Triton* frigate, on the ground that she was not in sight at the time of the capture, but had placed herself in such a position as to be effectual in cutting off the retreat of the galleon into a friendly port.[1]

Lord Stowell said: "The being in sight will not be sufficient; it would open the door to very frequent and practicable frauds, if, by the mere act of hanging on upon his majesty's ships, to pick up the crumbs of the captures, small privateers should be held entitled to an interest in the prize which the king's ships took."

A Spanish register ship of eight hundred tons and twenty-six guns (twelve-pounders), was taken on the 29th of November, 1799, by *The Hussar*, Captain Salter. *The Resolution*, a privateer of sixteen six-pounders, put in a claim of joint-capture, and it was allowed, on the ground of highly meritorious gallantry and perseverance in keeping the prize in chase, from the 5th to the 20th of November; of having fought her several times, notwith-

[1] *The Santa Brigada*, 3 Rob., 52.

standing the great disparity of force; and having kept constantly up with her, burning false lights, etc., during the night, to attract the notice and assistance of some British cruiser.

In a case where it appeared that one of two joint-chasers had been ordered to pick up the boats of the other, and by reason of the delay occasioned by the performance of this service, had lost sight of the prize, and a third ship came up and made the capture, it was held that no right existed to share with that ship.[1]

Lord Stowell said: "To obey the lawful commands of their superiors, is the first duty of the king's officers, and views of mere private advantage are of secondary consideration only, and must give way to the imperative requisitions of the public service."

In support of the blockade at Malta, in 1800, the British national ships of war, *Culloden* and *Northumberland*, were stationed at different ports. They preferred a claim as joint-captors, which was resisted on the ground that they had been unable to take actual part in the capture, in consequence of unfavorable weather.[2]

In the opinion of the court allowing the claim, Lord Stowell says:

"It is objected that they had not the physical means of pursuing, because the state of the wind was such that they could not quit the bay.

"Whether they would have pursued if it had

[1] *The Financier*, 1 Dod., 67.

[2] *The Guillaume Tell*, 1 Edw., 112.

been physically possible, it is not necessary to inquire. In the case of chasing by a fleet, the *animus persequendi* in all, is sufficiently sustained by the act of those particular ships which do pursue. It is, I think, highly probable, that even if the wind had been fair, the *Culloden* and *Northumberland*, as some of the other ships off Valetta did, would have remained in a state of inactivity, reasonably judging from the precautions taken, and from the flashes of the guns, that a sufficient force had already gone upon the service. Therefore, unless it can be maintained, which it certainly cannot, that the whole of a squadron must, in all cases, pursue, and that the other ships which remain inactive off Valetta are not entitled to share, upon what principle are these two ships to be excluded? But it has been urged, as the wind then was, ships of their burden could not have cleared the shoals so as to get out; and it comes, therefore, to a question of law, whether such an intervention of physical impossibilities will exclude a ship from being held part of a squadron associated for the express purpose of making the capture. There have been cases in which it has been held that physical impossibilities of some permanence, and which could not be removed in time, would have such an effect; as, for instance, in the case of a ship lying in harbor, totally unrigged, which has been held to be as much excluded as one totally unconscious of the transaction, because, by no possibility could that ship be enabled to cooperate in time. But I take it, that in no case, the mere intervention of a circumstance so extremely local and transitory as the accidental state of the wind, has been made the ground of exclusion. The

interests of joint-captors would be placed on a very precarious and uncertain footing, if a doctrine were admitted, which referred them to the legal operations of a casualty so variable in itself, and so little capable of being accurately estimated.

"It being proved in this case, that the whole fleet were acting with one common consent, upon a preconcerted plan, for the capture of this prize, it was as much a chasing from the orders of the officer in command, as if it had actually taken place in open sea. It was a chasing by signal, and in sight of these two ships; which, even if they had not been incapacitated by the state of the wind, in all probability would not have thought it necessary or proper to join in the pursuit.

"The cases which have been cited are very different from this. The *Genereux* (Lords, May 7th, 1803) was captured upon the coast of Sicily, at the distance of twenty-two leagues from Malta, by a part of the squadron which was sent to look out for her, while the rest kept their station off Valetta; there was no sight, and the utmost they could bring the case up to was, that a firing of the guns was heard by one of the stationed ships.

"In the case of the *Mars*, there was neither sight nor association; and in the *Frantmansdorff* (Lords, 1st August, 1795), there was the same effect of a want of association.

"Now, in this case, there was not only an actual sight, not only a perfect conusance of what was going forward, but as complete, and uniform, and persevering an association in this particular object, as well as in the general object of the blockade, as can be imagined. I am therefore of opinion, that

the *Culloden* and *Northumberland* are entitled to share, and that the same right will extend to the other ships which remained off Valetta, although they have not made themselves parties to this suit. But the national ship *Leda* was sent forward to the coast of South America to obtain information there for the guidance of the expedition against Buenos Ayres. She left the station before the armament arrived, and again returned a few days after the capture of the settlement made by the fleet. She was held not to be entitled to share as joint-captor, either by virtue of antecedent or of subsequent service in the enterprise."[1]

The ship of war *Defence* was in sight from the masthead on the occasion of a capture being made by another vessel, and on that ground claimed the privilege of joint-captor. Lord Stowell said: "I am not aware of any one instance in which the court has pronounced for a joint-capture on being in sight only from the masthead. I do not say that such a case would be entirely and absolutely out of the reach of the principle on which the being in sight is admitted to constitute an interest of joint-capture; but this may be safely affirmed—that if the court was to pronounce for such a claim, upon such evidence, it would be, in all respects, a very extreme case indeed."[2]

No joint-capture when in sight only from the masthead.

The ships *Alfred*, *Dictator*, *Bittern*, *Zephyr* and *Pelican* claimed to share in the property taken on land, and in the capture of one vessel, and in the

[1] *Buenos Ayres*, 1 Dod., 28. [2] *The Robert*, 3 Rob., 194.

distribution of bounty for the destruction of others, upon the capture of the island of Trinidad by the British. The claim was based on the averment that these vessels were in sight, and the admiral (Harvey) in command of the fleet, expressed an opinion that these vessels must have been in sight the evening before the enemy's ships were set on fire and the capture made.

The being in sight to be affirmatively proved.

Lord Stowell said: "The grounds of this opinion seem to be very rational and just, and if supported on the part of the vessels themselves, they might have been very material. But the court is bound to expect that the being in sight should be proved by some direct evidence applied to the fact, and not merely by opinion, formed upon the conjectures of any persons, however respectable they may be.

"It is said that they heard the explosion. But it is a common phrase, not more contemptible for being common, that hearing is not seeing.

"The explosion of such a body as a ship of war would be heard at a stupendous distance.

"It is a well-known fact that, in the famous battle in the Downs, the explosion was heard in St. James's Park, and was made the foundation of a mathematical calculation by Sir William Petty, with respect to the velocity of the progress of sound. So, with regard to the conflagration, the atmosphere would be illuminated to a prodigious distance; but it would be ludicrous to say that all who were within the reach of these appearances, produced by the fire, are to be taken in law as present at the occurrence itself."[1]

[1] *The San Damaso*, 3 Rob., 234.

Three days after the battle of Trafalgar, a Spanish man-of-war was taken by the British ship *The Dongal*, and *The Leviathan*, though in sight at the time, was not admitted as joint-captor, because she was actually employed in taking care of other ships and prizes captured in the battle, and in watching the movements of *The Monarch*, another Spanish ship.[1]

Mere intimidation without co-operation or active assistance is not sufficient basis for a claim of joint-capture.

Mere intimidation without cooperation insufficient to entitle to the rights of joint capture.

Certain East India ships were employed to transport a number of troops to the Cape of Good Hope, and claimed to share in the capture of that possession made in 1795.

Lord Stowell said: "If they had been associated to act in conjunction with the fleet, and did so act, they might acquire an interest which, on proper application, would be sure to meet with due attention. The question for me to consider, then, will be, whether they have acquired that military character or not?

"Their pretensions have been put forward on several grounds.

"It is first said that they were associated with the fleet. Mere association will not do—the plea must go further, and show in what capacity they were associated, and that capacity must be directly military. Transports are associated with fleets and armies for various purposes connected with, or subservient to, the military uses of those fleets and armies. But if they are transports merely, and as such are employed simply in the transportation of men or stores—they

Nor mere association.

Unless in a direct military capacity.

[1] *The El Rayo*, 1 Dod., 42.

do not rise above their proper mercantile character, in consequence of such employment. The employment must be that of an immediate application to the purposes of direct military operations, in which they are to take a part.

"It is next placed on the ground of intimidation, and, it is said, that when the enemy is proved to have been intimidated, where it is not matter of inference, but of *actual proof*, the assistance arising from intimidation is not to be considered constructive merely, but an actual and effective co-operation.

"But I take that to be not quite correct, for a hundred instances might be mentioned, in which actual intimidation might be produced, without any co-operation having been given. Suppose the case of a small frigate going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but no one would say that such a terror would entitle them to share: though the fact of terror was ever so strongly proved, there would not be that co-operation and active assistance, which the law requires to entitle non-commissioned vessels to be considered as joint-captors. What is the intimidation alleged? That the Dutch forces were about to make an attack on the British army, but, on the appearance of these fourteen ships, desisted. This was an intimidation of which the ships were totally unconscious, and which would have been just as effectually produced by a fleet of mere transports: and I see no principle on which I could pronounce these ships entitled, on which I should not also be

obliged to pronounce any fleet of merchantmen entitled, in a similar situation; for any number of large ships, known to be British, and not known to be merchantmen, would have produced the same effect. The intimidation was entirely passive, there was no *animus* nor design on their part, nor even knowledge of the fact; for it was not till the next day, when their commodore returned from Lord Keith, that they knew any thing of the matter, or even thought of the terror that they had assisted in exciting. I take it to be incontrovertibly true, that no case can be alleged, in which a terror so excited has been held to enure to the benefit of a non-commissioned vessel. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy. That it is a case of assistance, analogous to that of joint-chasing, on which it is said to be sufficient, if the non-commissioned ship puts itself in motion, and the cases of the *Twee Gesuster*, in the last war, and the *La France* have been relied upon. I see no ground on which the analogy can be supported. The cases cited were of a very different nature. In both of them, the non-commissioned ships chased, *animo capiendi*, and contributed materially, directly and immediately in the capture. In the present case, these ships approached, it is true, the Cape of Good Hope, but with no *animus capiendi*, with no hostile purpose entertained by themselves, for they were totally ignorant of the objects of the expedition. It is moreover, obvious to remark, that all cases of joint-chasing at sea, differ so materially from all cases of conjunct operations upon land, that they are with great danger of in

accuracy, applied to illustrate each other. In joint-chasing at sea, there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained, and much intimidation may be produced, but in cases of conjunct operations upon land, it is not the mere intrusion, even of a commissioned ship, that would entitle parties to share. The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition which the public authority had, in no degree committed to them, should be at liberty to say, 'we will co-operate,' and that they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally intrusted. Expeditions of this kind, designed by the immediate authority of the state, belong exclusively to its own instruments, whom it has selected for the purpose, and it might be attended with very grave obstruction to the public service of the country, if private individuals could intrude themselves into such undertakings, uninvited, and under color of their letter of marque. I think, therefore, that the cases of chasing at sea and of conjunct operations on land, stand on different principles, and that there is little analogy which can make them clearly applicable to each other.

"It is next said, that they were directed to hoist pennants, and that it was the opinion of a very high military officer in a former case, that the per-

mission to wear the pennant did give the character of king's ship; but the decision in the very case in which that opinion was offered (in the capture of Negapatam), held, that a ship, which, in that case had worn a pennant, was not to be considered in a military character, but as a transport; the mere circumstance, therefore, that these ships, which were large ships, and had before carried pennants, and had taken them down only out of respect to the king's ships, and were desired to hoist them again, I cannot hold to be a sufficient proof that they were, by that act, taken and adopted into the military character. I can attribute no such effect to a mere act of civility and condescension. In the next place, it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only, that their boats were employed in carrying provisions and military stores on shore. That was a service certainly, but not a service beyond the common extent of transport duty. They landed them probably at the same time with the troops, for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried."[1]

A claim of joint-capture was made on behalf of land forces, said to have co-operated with the fleet in the taking of the Dutch fleet in Saldanah bay in 1796.

In rejecting the claim Lord Stowell said: "The question is, whether such a case has been made out,

The question considered whether arms

[1] *The Cape of Good Hope*, 2 Rob., 282.

forces can be entitled as joint-captors with the naval forces.

on the part of the army as will support their claim to be considered joint-captors? In the first place, it is not pretended that it is a case which comes within the provisions of the prize act (33 Geo. III. c. 16), which directs the army to share in some cases in conjunction with the fleet. In the next place, it is not argued, that this is a case of concerted operations. That the army and navy might have similar views is not contested, but whatever was done was done separately, and without concert or communication. Thirdly, it cannot be denied that it lies with the army to make out a case of joint-capture, and to show a co-operation on their part, assisting to produce the surrender—for the surrender was made to the fleet alone, possession was taken by the fleet; the army could not take it; therefore, the *onus probandi* lies on them to prove that there was an actual co-operation on their part: for it is, I think, established by judicial authority, and particularly in the late case of *Jaggernaich* (Lords, January 26, 1799), that much more is necessary than a mere being in sight, to entitle an army to share jointly with the navy in the capture of an enemy's fleet. The mere presence, or being in sight, of different parties of naval force, is, with few exceptions, sufficient to entitle them to be joint-captors, because they are always conceived to have that privity of purpose which may constitute a community of interest; but between land and sea forces, acting independently of each other, and for different purposes, there can be no such privity presumed; and therefore to establish a claim of joint-capture between them, there must be a contribution of actual assistance, and the mere

Material service requisite to entitle the army to the benefit of joint

presence, or being in sight, will not be sufficient. Fourthly, I am strongly inclined to hold, that when there is no preconcert, it must not be a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint-capture. Where there is preconcert, it is not of so much consequence that the service should be material, because then, each party performs the service that is assigned to him, and whether that is important or not, is not so material. The part is performed, and that is all that was expected. But where there is no such privity of design, and where one of the parties is of force equal to the work, and does not ask for assistance, it is not the interposing of a slight aid, insignificant, perhaps, and not necessary, that will entitle the other party to share.

capture with the navy, unless in case of action by preconcert.

"The principle of terror, to support this claim, must be a terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not say that a case might not, under possible circumstances arise, in which troops on shore might be allowed to share in a capture made in the first instance by a fleet. I will put this case. Suppose a fleet should come into a hostile bay, with the design of capturing a hostile fleet lying there, and a fleet of transports should also accidentally arrive with soldiers on board; suppose these soldiers made good their landing, and gained possession of the hostile shore, and by that means should prevent the enemy from running on shore and from landing, and thereby influence them to surrender. I will not say that troops in such a

situation might not entitle themselves to share, although the surrender had been made actually to the fleet. But, suppose the troops to land on a coast not hostile, but not on their own coast—I do not suppose that the possession of such a shore would draw the same consequences after it, for what difference would it make whether there were troops on shore or not? The enemy must know, that in a day or two the landing on a shore, to them hostile, must be followed by sure and certain captivity, whether there was a party of military or not.

"What additional terror does an army hold out? The consequences of captivity would be the same in either case, and unless there had been a notice and denunciation of particular severity, I do not understand that by the laws of war they would be exposed to more than a rigorous imprisonment.[1]

"Where a capture is made by a conjoint expedition, composed of a British naval force and an army of allies, the case is not within the provisions of the British prize act, and therefore the captors must altogether depend upon the government bounty for reward for such a capture.[2]"

Rights of joint-captors not vitiated by the fraud of the actual captors.

The claim of joint-captors is not invalidated by the fraudulent conduct of the actual captors.

The master of *The Sirius*, the capturing frigate, was charged with having, "contrary to the rule and practice of the navy," made no signal of an enemy, to other British vessels in sight; and Lord Stowell said, admitting the other to the benefit of joint-cap-

[1] *The Dordrecht*, 2 Rob., 57.

[2] *The Stella del Norte*, 5 Rob., 350; *The British Guiana*, 2 Dod., 151.

ture: "Their discontinuance of the chase and alteration of the course, is not an act of their own, but an act wrongfully occasioned by the neglect or mistake or wilful omission on the part of the *Sirius;* and being so, would not have the effect which generally would follow upon the discontinuance of the chase and alteration of the course, before the act of capture took place; for generally, a discontinuance and alteration would defeat the interest of a joint-captor, by destroying the presumption of assistance and intimidation."[1]

There are many other cases in which fraud on the part of the actual captor has been held to vest an interest as joint-captors in those who would have been co-operators or constructive captors, but for such fraudulent act.[2]

In cases where, at a period antecedent to the capture, an engagement had taken place between the vessel claiming as joint-captor, on the basis of constructive assistance, and the prize, the courts lean strongly in favor of upholding the claim.

The British ship-of-war *Sparrow*, had engaged *L'Etoile*, a French frigate, a joint-cruiser, the *Hebrus* then being in the distance. On the following day *The Hebrus* captured *L'Etoile*, *The Sparrow* still being in chase. The claim to share on the part of *The Sparrow* was admitted by Lord Stowell saying: "I hold it to be a clear and indisputable rule of law, that if two vessels are associated for one

[1] *The Waaksamheid*, 3 Rob., 7.

[2] *The Galen*, 1 Dod., 433; *The Herman*, 3 Rob., 8; *The Robert*, ib.,194; *The Endraught*, ib., Appendix, 35; *The Minerva*, 2 Acton, 112; *La Virgine*, 6 Rob., 124; *L'Amitie*, 6 Rob., 267; *The Sparkler*, 1 Dod., 362.

common purpose, as these vessels were, the continuance of the chase is sufficient to give the right of joint-capture. Sight, under such circumstances, is by no means necessary, because, exclusive of that, there exists that which is of the very essence of the claim, encouragement to the friend, and intimidation to the enemy. Both *The Hebrus* and the enemy's frigate knew that *The Sparrow* was astern, and that she was using her best endeavors to come up. She was a consort of the actual captor, and pursued the prize in conjunction with her, and had not discontinued the pursuit when the capture was consummated."[1]

Previous concert a sufficient basis for a claim of joint-capture if not abandoned at the time of the capture.

If two cruisers casually meet, and the captain of the one is senior in service to the captain of the other, though they are of equal rank, by the rules of the service the ship under the command of the junior officer is under the direction of the other. If, in pursuance of such direction, the junior captain is ordered to pursue one of two hostile vessels in sight, while the senior pursues the other, both vessels being taken, the junior is entitled to share as joint-captor of both.[2] "I consider it to be a clear rule of law," said Lord Stowell, in this case, "that ships engaged in a joint-enterprise of this kind, and acting under the orders of the same superior officer, are entitled to share in each other's prizes; and it is certainly for the benefit of the public service that a rule of this sort should prevail, in order that the public force of the state may be distributed so as to produce the greatest pos-

[1] *L'Etoile*, 2 Dod., 107. [2] *The Empress*, 1 Dod., 368.

sible advantage to the country, and the greatest possible annoyance to the enemy."

Where, however, there has been such a dispersion of vessels, between whom there existed a previous concert, that it had become manifestly impossible for either to receive support or assistance from the other, the mere fact of original concert will not support a claim of joint-capture.

A French ship was taken by one of three English ships, which, having been apprised of the design of the enemy's ship to attempt an escape from the harbor of Port au Prince, had stationed themselves at the several outlets of that harbor. The enemy's ship having been taken by one of the British ships, the others not being present, claim to share as joint-captors was preferred by the ships not present, and rejected.[1] The justice of this decision, or its correctness upon the established principles in the law of joint-capture, is not readily appreciated. It would certainly seem that the ships guarding the outlets of the harbor through either of which the enemy's ship might have escaped, and probably would have escaped but for their being stationed there, were quite as much co-operating in the capture, as ships continuing on the chase, at the time of the actual capture by one which happened to outsail her consorts.

There is certainly no analogy between such a case and that of a claim to joint-capture by a cruiser who had reconnoitred the prize, but at the time of the capture by another, had stood off on another chase.[2]

[1] *The Mars*, 2 Rob., 22.

[2] *The Lord Middleton*, 4 Rob., 155; *The Rattlesnake*, 2 Dod., 32.

The British ship *Albion*, by signal, was detached from the squadron and ordered to give chase. She did so, and completed that duty; and afterward, seeing another vessel of the enemy, she made a second chase, and captured the ship; it was held that the ships of the squadron were entitled to share as joint-captors in the second prize.[1]

There was, at one time, much discussion in the admiralty courts, both of England and France, whether, in a case where a ship of the enemy is taken, and subsequently lost to an enemy's cruiser, and afterward retaken by a ship other than the first captor, the first captor had an interest in the prize, subject to the salvage claim of the recaptors, or whether the recapture was not in such case to be regarded as an original capture, vesting the interest in the second captors. And this last has become the established doctrine.

It was so decided in the French court of prize, by a decree made in 1748,[2] and by the Lords of the Admiralty in England, in two cases involving the question;[3] although, in a previous case in 1778, it had been decided by the court of admiralty, that the first taker was to be considered the actual captor, and the subsequent taker the recaptor, entitled to a high salvage.[4]

A captor may be deprived of the benefit of his capture either by rescue or by a recapture. They

[1] *Le Bon Aventure*, 1 Acton, 211.

[2] Valin, *Traite des Prises*, c. vi., § 1.

[3] *The Polly* (Lords, Nov. 21, 1780); *The Marguerite*, (Lords, April 3, 1781).

[4] *The Lucretia*, 1778.

are thus distinguished: a rescue is where the captured party rise and succeed in effecting a recovery of the property captured; a recapture is where a prize, having been taken by an enemy, is recovered from his possession by the arrival of a friendly force. Recapture and rescue defined and distinguished.

There is a kind of rescue which partakes of the character of the recapture; and this occurs where the weaker party, before he is overpowered, obtains relief from the arrival of friendly succor, and is thus preserved from the possession of the enemy.

A recapture, in all cases where it can be effected, is a duty incumbent upon friends or allies.[1] To recapture a duty.

A rescue is matter of merit rather than of duty. Lord Stowell says: "Seamen are not bound by their general duty as mariners to attempt a rescue; nor would they have been guilty of a desertion of duty in that capacity, had they declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubt whether it ought to be so regarded, I desire not to be considered of that number. As to the situation and character of persons engaged in such attempts, it is certainly to be regarded an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship, or in discharge of any official duty, either ordinary or extraordinary."[2] To rescue a meritorious act.

The distinction between the obligation, to the performance of the rescue, which partakes of the nature of a recapture, and of the rescue proper, is

[1] *The Two Friends*, 1 Rob., 271; *The Helen*, 3 Rob., 224.

[2] *The Two Friends*, 1 Rob., 271.

obvious; for in the one case the capture is still imperfect, and in the other it is complete. The law of nations does not require that a vessel should be commissioned in any manner, in order to entitle her, and, indeed, to impose upon her the obligation, to effect a recapture, if they are possessed of such superiority as to render it just that they should hazard a contest.[1]

Out of the questions of rescue and recapture, arise the important considerations of postliminium and salvage.

The right of postliminium considered.

Postliminium is thus defined by Vattel: "The right of postliminium is that, in virtue of which, persons and things taken by the enemy are restored to their former state, on coming again into the power of the nation to which they belonged. When persons or things, captured by the enemy, are retaken by our allies or auxiliaries, or in any other manner fall into their hands, this, so far as relates to the effect of the right, is precisely the same thing as if they were come again into our power, since, in the cause in which we are jointly embarked, our power and that of the allies is but one and the same."[2] So that, when possessions, taken by the enemy, are recaptured or rescued from him by the fellow-subjects or allies of the original owner, they do not become the property of the recaptor or rescuer, as if they had been a new prize, but are restored to the possession of the original owners, by what is called the right of postliminium or *jus postliminii*, upon certain condition presently

[1] *The Helen*, 3 Rob., 224. [2] Vattel, Lib. III., c. xiv., § 204.

to be considered.[1] But the right of postliminium does not take effect in neutral countries, for when a nation chooses to remain neutral in war, she is bound to consider it as equally just on both sides, as far as relates to its effects, and consequently to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, or the right of postliminium, would be declaring in favor of the former, and departing from the line of neutrality.

The full benefit of postliminium is not attached to movable property, as are lands, houses, and other fixed possessions. The reason of this is simply the impracticability of perfect identification as a general thing, and the consequent presumption of abandonment of the owner.

But if the recapture of movables follow hard upon the capture, the right of postliminium is perfect. This is the general law of nations with regard to the right of postliminium upon movables. But, "prisoners of war, who have given their parole, territories and towns which have submitted to the enemy, and have sworn or promised allegiance to him, cannot of themselves return to their former position, by the right of postliminium, for faith is to be kept, even with enemies. But if the sovereign retake those towns, countries or prisoners, who had surrendered to the enemy, he recovers all his former rights over them, and is bound to reestablish them in their pristine condition."[2]

[1] Vattel, Lib. III., c. xiv., § 208. [2] Vattel, Lib. III., c. xiv., §§ 210, 211.

The rights of postliminium upon property which has been alienated by the enemy is a subject of much importance. The distinction here exists between movable and immovable property. "Let it be remembered," says Vattel, "as to immovables, that the acquisition of a town taken in war, is not fully consummated till confirmed by a treaty of peace or by the entire submission or destruction of the state to which it belonged. Till then, the sovereign of that town has hopes of retaking it, or of recovering it by a peace. And from the moment it returns to his power, he restores it to all its rights, and consequently it recovers all its possessions, as far as in their nature they are recoverable. It therefore resumes its immovable possessions from the hands of those persons who have been so prematurely forward as to purchase them. In buying them of one who had not an absolute right to dispose of them, the purchasers made a hazardous bargain, and if they prove losers by the transaction, it is a consequence to which they deliberately exposed themselves. But if that town had been ceded to the enemy by the treaty of peace, or was completely fallen into his power by the submission of the whole state, she has no longer any claim to the right of postliminium, and the alienation of any of her possessions by the conqueror is valid and irreversible, nor can she lay claim to them, if in the sequel some fortunate revolution should liberate her from the yoke of the conqueror."[1]

As to movables, we find the law to be otherwise, as Vattel states in the same section:

[1] Vattel, B. III., c. xiv.

"When movable property has passed into the hands of the enemy, unless its recovery be immediate, and under those rare circumstances as repel the presumption of its abandonment and render it susceptible of a complete identification, the right of postliminium, as we have seen, does not attach to it; *a fortiori*, does it cease to be affected by any such right, after having passed into the complete possession of the enemy, it has been by him in good faith transferred to a neutral."[1]

Although it is very clearly established by the law of nations, that the right of postliminium, as to movables, is so far extinguished when they have arrived to the complete possession of the enemy, as to enable him to confer, by alienation, an indefeasible title upon a neutral, yet the question in this connection, of what constitutes such complete possession has been the subject of no little discussion. While some writers have stated it to be sufficient if the property have been twenty-four hours in the enemy's possession, others have declared it to be requisite that it should be carried *infra præsidia*, that is, within the camps, towns, ports or fleets of the enemy; and still others have drawn various arbitrary lines. It has become in later days a well settled principle, that a possession of a more absolute and decided character is requisite to confer such a title as to extinguish the right of postliminium.

"I apprehend," says Lord Stowell, in a case involving the question, "that by the general practice of the law of nations, *a sentence of condemnation* is,

[1] 2 Wooddes, 441, § 34.

at present, deemed generally necessary—and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation, as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance, in which a man having purchased a prize-vessel of a belligerent, has thought himself quite secure in making that purchase, merely because that ship had been in the enemy's possession twenty-four hours, or carried *infra præsidia*."[1]

A sentence of condemnation necessary to change property in favor of the vendee of recaptor.

The rule which requires a sentence of condemnation is undoubtedly the established rule in England. It is there held, that until such condemnation, the property is not changed in favor of the vendee or recaptor, so as to bar the original owner.[2]

As long ago as in the reign of Charles II., a solemn judgment was rendered on this point, and restitution of a ship was decreed, after she had been fourteen weeks in the enemy's possession, because she had not been condemned. This early judgment of the Court of Admiralty is cited with approval by Lord Mansfield in a case before him in which the point arose.[3]

The English courts of common law have since enforced the rule,[4] and even to the extent of holding, that after four years' possession, and the performance of several voyages, the title to the property is not changed without a sentence of condemnation.

A sentence of condemnation has been universally

[1] *The Flad Oyen*, 1 Rob., 134. [2] 3 Rob., 236.

[3] *Goss* vs. *Withers*, 2 Burr., 583.

[4] *Assievedo* vs. *Cambridge*, 10 Mod., 79; *vide The Constant Mary*, 3 Rob., 97, 237.

held to intend: first, a sentence by a court of competent jurisdiction, and second, a sentence of such court either in the country of the enemy or an ally, and not in a neutral country.

Termination of right of postliminium.

The right of postliminium terminates by the declaration of peace, between the country of the enemy and that from which the prize was taken. Therefore, it has been held, that a ship which has been sold to a neutral, after an illegal condemnation by a prize court, and which would not have been considered as a valid transfer of a legal title in time of war,—by the intervention of peace, was to be deemed a legitimate possession in the neutral's hands, and cured of all defects of title. "Otherwise," observed Lord Stowell, "it could not be said that the intervention of peace would have the effect of quieting the possessions of the enemy, because if the neutral possessor was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him; and as to a renewal of war, though that may change the relations of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before."[1]

Where a transfer has been made in good faith by a hostile captor to a neutral, at the time of the assignment, the title of the assignee will not be affected by his subsequently becoming an enemy.[2]

The rules which have been stated are those which, by the general law of nations, govern the right of

[1] *The Sophie*, 6 Rob., 142.

[2] *The Purissima Conception*, 6 Rob., 45.

postliminium, and are considered of binding force where the interests of neutrals are concerned. In cases, however, affecting only the citizens or subjects of the nation, some peculiar modifications of the general principle have been introduced by special statute provisions, both in England and in the United States.

By acts of Parliament[1] it is provided that the right of postliminium, as between British subjects, shall continue even to the end of the war; and, therefore, the ships or goods of the subjects of that country, taken at sea by an enemy, and afterward retaken at any indefinite period of time, and whether before or after a sentence of condemnation, are to be restored to the original proprietors. An exception, however, is made as to ships which the enemy have set forth as vessels of war; these are not subject to restoration to the original owners, but belong wholly to the recaptors. But if the property recaptured was, at the time of the original capture, employed in an illegal trade, this works a divesting of the original right, and the former owner will not be admitted to restitution from the recaptors.[2]

The right of postliminium by the laws of the United States.

The United States government, by act of Congress,[3] expressly continues the *jus postliminii*, until a divesting of the title to captured property by a sentence of condemnation. It also directs a restitution of recaptured property to the foreign and friendly owner on the payment of reasonable salvage. But the provisions of the law are declared

[1] 13 Geo. II., c. iv.; 17 Geo. II., c. xxxiv.; 19 Geo. II., c. xxxiv.; 43 Geo. III., c. clx.; 2 Burr., 1198; 1 Black. Rep., 27.

[2] *The Walsingham Packet*, 2 Rob., 77.

[3] March 3d, 1800, U. S. Laws.

not to apply where the property has been condemned as prize by a competent court, before recapture, nor when the foreign government would not restore the goods or vessels of citizens of the United States, under the like circumstances. This last provision of the statute law of the United States is understood to be the rule in England. In a case involving the right of postliminium between the subjects of Great Britain and her allies,[1] Lord Stowell says: "The actual rule I understand to be this: that the maritime law of England having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act toward British property on a less liberal principle. In such a case, it adopts their rule, and treats them according to their own measure of justice."

General right of salvage on restitution by recaptors.

The obligation of recaptors to restore the property to the original owner, is, as a general rule, connected with the right on their part to be paid a compensation or reward given for saving or recovering the property: and this is denominated salvage; and to distinguish it from the ordinary salvage known to the commercial law, it is called military salvage.

Rate of compensation.

The extent of this compensation is usually fixed by legislative enactments, and the rates vary with varying circumstances, and in some cases the amount is within the uncontrolled discretion of the court.[2]

[1] *The Santa Cruz*, 1 Rob., 49; *vide* also *The San Francisco*, 1 Edwards, 279.

[2] *The Dickenson*, Hay and Mariott, 48; *The Betsy*, ib., 81; *The Two Friends*, 1 Rob., 279.

To sustain a claim for military salvage, there must be first, a lawful original capture; and second, a meritorious service in effecting a recapture.

Right of salvage attaches as well to cases of rescue as of recapture.

The right of military salvage is not limited to cases of recapture, it is extended equally to the case of the recovery of captured property by rescue; this, however, is confined to the rescue, strictly so called—that is, to the rescue effected by the rising of the captured party and the recovery of the property after the capture has become complete, and the possession of the enemy virtually absolute. Salvage is never awarded in cases of rescue by the arrival and assistance of a fresh succor, before the property has been subjected to the possession of the enemy.

"No case has been cited," says Lord Stowell, "and I know of none in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly, as to be certainly and inevitably under his grasp. There has been no case of salvage, where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands of the enemy.[1]

In principle, the actual performance of the service of recapture, is sufficient to establish the claim for salvage, even though it were not the primary intention, or in the immediate contemplation of the recaptors to perform the service and effect the recovery.[2]

No commission requisite for recapture,

As no commission or letter of marque is requisite to the performance of the service of recapture,

[1] *The Franklin*, 4 Rob., 147. [2] *The Progress*, Edwards, 211.

so, of course, the recaptors are entitled to salvage, whether acting with or without a commission.[1]

therefore not requisite to entitle to salvage.

Salvage is not due to a national vessel for the service performed by a recapture from the enemy, of another vessel employed in the public service. This rests upon the obvious principle that the performance of such a service is not only the duty and obligation of the vessel-of-war, but is in the direct line of the business to which it is devoted on behalf of the nation, and does not differ in principle from the service rendered by one ship of war to another in battle.[2]

Salvage not due to a national vessel on recapture of another national vessel.

In order to entitle the recovering party to salvage, it is not essential that any risk should have been encountered in the service. Therefore, a claim to military salvage is due where a vessel taken by the enemy is purchased at sea, and brought into port for restoration to the owner.[3]

No hazard need be encountered to entitle to salvage.

It has been held, that where a vessel of the enemy is taken by the adverse belligerent, lost again by a cruiser of the enemy, and subsequently recaptured, the recaptors are entitled to the entire property.[4]

Every person aiding in a rescue has a lien for salvage.

Every person aiding and abetting and assisting has a *lien* on the thing saved. He has his action *in personam*, also, to recover for his meritorious service, but his first and proper remedy is *in rem*.

In the case of a recapture, where the property is again taken by the enemy, and followed by con-

[1] *The Helen*, 3 Rob., 224; *The Urania*, 5 Rob., 148; *The Progress*, Edwards, 211; *The Hope*, Hay & Marriott, 216.

[2] *The Belle*, Edwards, 66.

[3] *The Henry*, Edwards, 162.

[4] *The John and Jane*, 4 Rob., 217 and note.

demnation in an enemy's port, if that condemnation be subsequently overruled by an order of release from the sovereign power of the state, the right to salvage is revived under the recapture.[1]

The doctrine of vessels in sight applied to recaptures as basis of salvage claim.

It is a familiar principle in the law of capture, as we have seen, that vessels of war in sight at the time of the capture, are entitled to share in its benefits. The same principle is applied to the right of salvage in the case of recapture. National ships in sight are regarded as joint-captors. There is a reciprocity in the rule which operates sometimes to the advantage, and sometimes to the disadvantage, of every vessel in the service.

Not allowed to privateers in sight when recapture made by national ship.

But privateers in sight, when a recapture is made by a national vessel, are not allowed to share. And hence the rule of reciprocity not existing as between privateers and national vessels, where a recapture is made by a privateer, a national vessel being in sight, the national vessel is not permitted to share.

"It would be hard," says Lord Stowell, in a case where the question incidentally arose, "if the privateer, being the actual captor, and not having that reciprocal interest in other cases, should be deprived of a much greater proportion of the reward, and should only share on terms of reciprocity, where the king's ship is only the constructive recaptor, from the mere accident of being in sight, perhaps at a great distance, and unconscious of the fact. Now what are the circumstances of the present case? It did appear to me, on the evidence offered to the the court, that the interposition of the privateer was not fraudulent. It was not the case of a pri-

[1] *The Charlotte Caroline*, 1 Dod., 192.

vateer stepping in at the end of a long chase, perhaps to deprive the king's ship of the due reward of her own activity and enterprise. Here it was clear that both were in actual pursuit of the enemy. It was not a constructive recapture on either side. There was a concurrence of endeavor in both, though the privateer came up first, and struck the first blow. Considering them both, therefore, as joint actual recaptors, I see no reason why I should take the case out of the common operation of that principle which apportions the reward to the parties according to their respective forces."[1]

Revenue-cutters entitled as private ships.

Revenue cutters have been held to be entitled to salvage on recapture, in like manner as private ships of war.[2]

Freight contributes to salvage when earned

Whether freight should be made to contribute to the salvage in case of a recapture, depends upon the question whether the freight was in the course of being earned. In giving freight, the court does not make separations as to minute portions of it. If a commencement has taken place and the voyage is subsequently accomplished, the entire freight is included in the valuation of the property on which salvage is granted.[3]

Where the vessel has never been in the actual and bodily possession of the recaptor, no salvage is earned.[4] And in order to entitle to salvage as upon a recapture, the property must have been in

[1] *The Wanstead*, 1 Edwards, 369; *The Providence*, ib., 270; *The Dorothy Foster*, 6 Rob., 88.

[2] *The Bellona*, Edwards 63; *The Sedulous*, 1 Dodson, 253.

[3] *The Dorothy Foster*, 6 Rob., 88.

[4] *The Edward and Mary*, 3 Rob., 305.

the actual or constructive possession of the enemy. Salvage is not allowed merely for stopping a ship going into an enemy's port.[1]

Salvage due from neutrals.

As a principle of international law, military salvage is due from neutrals; and in cases of restitution of the recaptured property of neutrals, the courts are at liberty to assess such rates of compensation as, in their judgment, are demanded by the nature of the service and the circumstances of the particular case, and are not limited to the rates fixed by the statutes, which apply only to the restitution, upon recapture, of the property of the subjects of the nation of the recaptors.[2]

Where the property of a neutral is taken as a prize by the enemy, and recaptured by the adverse belligerent, the probability of its condemnation, had it reached the port and been subjected to the action of the courts of the country of the captors, is to be considered in determining the question of salvage. If there is no ground for supposing that a restitution would not have been ordered, then it is to be restored on the recapture, without the payment of salvage.

Salvage was usually allowed upon the recapture by British vessels of neutral property taken by French cruisers in the last war, because there was reason to apprehend that such property would, in almost all cases, be condemned by the French courts of admiralty; and such assessments of salvage were regarded, under the circumstances, although

[1] *The Ann Green and cargo*, 1 Gallison, 293.

[2] Marshall, 474; *The Two Friends*, 1 Rob., 271.

an exception to the general rule, as reasonable and just by the neutral merchants.[1]

When a lawful belligerent had become possessed, by lawful means, of the property of the enemy, it was an ancient custom, of almost every nation, to redeem it from his possession by the payment of a ransom. The contract of ransom has fallen greatly into disuse; and by statutes in Great Britain,[2] ransoms are expressly prohibited under severe penalties. They are spoken of by Lord Stowell, in the case of the ships taken at Genoa, as subject to great abuse, being, in the common acceptation, contracts entered into at sea by individual captors, and liable to be abused, to the great inconvenience of neutral trade. But ransoms, under circumstances of extreme necessity, are yet allowed; and a ransom bill, when not prohibited by express statute, is a war contract, protected by good faith and the law of nations. Although the contract of ransom is considered in England as tending to relax the energies of war, and to deprive cruisers of the opportunities of recapture, yet "it is, in many views," says Chancellor Kent, "highly reasonable and humane. Other maritime nations regard ransom as binding, and to be classed among the few *commercia belli*."[3]

Ransom prohibited by statute in Great Britain.

Valid contract under the law of nations when not prohibited by local law

Ransom has not been prohibited by any law of

Not prohibited

[1] *The Eleanor Catherina*, 4 Rob., 156; *The Waronskan*, 2 Rob., 299; *The Carlotta*, 5 Rob., 54; *The Huntress*, 6 Rob., 104; *The Samson*, 6 Rob., 410; *The Barbara*, 3 Rob., 171; Abbot on Shipping, Part III., c. xi., § 13.

[2] 43 Geo. III., c. c.; 45 Geo. III., c. lxxii.; 22 Geo. III. c. xxv.

[3] Kent's Com., 114; *vide* also Azuni's Maritime Law, c. iv., art. 6; Emerigon, I., c. xii., § 21; Valin XI., art. 66; Le Guidon, c. vi., art. 2; Grotius, Lib. III., c. xix.

in the United States.

the United States, and has been recognized as a valid contract by the courts of that country, as well as of France and Holland. The effect of the ransom is equivalent to that of a safe conduct granted by the authority of the state of the captor; and it is binding upon the commanders of other cruisers of the belligerent nation, as well as upon those of an allied nation, by the implied obligation of the treaty of alliance. The protection of the ransomed vessel is, however, limited to the time, as well as to the course or localities prescribed by the contract, unless, by stress of weather or unavoidable necessity, the time has been exceeded, or the course departed from.

Its effect.

The captor who releases his capture on ransom, does not become the insurer of the property, except against recapture by cruisers of his own nation or allies. Therefore, if the ransomed vessel be wrecked before she arrives in port, the ransom bill is nevertheless due.

If the captor, having the ransom bill on board his vessel, should himself be captured by the enemy, the ransom becomes part of the lawful conquest of the enemy, and is discharged.

These principles are laid down by the elementary writers,[1] and have been frequently recognized and applied by the courts of the United States.[2]

[1] Pothier, Traite du droit de proprieté, Nos. 134, 135, 138, 139; Valin, Ord. des Prises, art. 19.

[2] *Goodrich* vs. *Gordon*, 15 Johns. R., 6; *Miller* vs. *The Resolution*, 2 Dallas, 15; *The Lord Wellington*, 2 Gallison, 104; *Maisonnaire et als.* vs. *Keating*, 2 Gall., 336; *Gerard* vs. *Hare*, Peters's C. C. R., 142; *Moodie* vs. *Brig Harriet*, Bees. R., 128.

RECAPTURE AND MILITARY SALVAGE.

[Several cases of recapture by public ships of the United States, of the merchant vessels of her citizens, which had been seized by rebel cruisers, have occurred during the existing war.

In every such case, the merchant owner, without objection, has paid the military salvage provided by statute, of one-eighth the value of the property recaptured, upon its restitution, and in like manner, as if the original capture had been lawful.[1]

It is obvious, that had objection been made to the validity of such claim, it could not have been allowed in the courts of the United States, without involving a judicial concession of belligerent rights to the insurgents, of the same character, and to like extent, as that virtually accorded by the Executive department of the government, in the exchange of rebel captured privateers, as prisoners of war.

By the terms of the Act of Congress of 1800[2] the compensation awarded as salvage for the recapture from the enemy, of a public ship, or of a merchant vessel, whether of the country of the recaptors or a neutral, is allowed upon the express condition that the property recaptured, has not been condemned in the courts of the captors prior to the recapture; thus, in effect, resting the claim to compensation upon the lawfulness of the original capture, and its successful defeat by recapture, before the inchoate right to the captured property had become absolute by a decree.

[1] Vide *The Mary Alice*, *The Henry C. Brooks*, *The Lizzie Weston*. MS. Decisions U. S. Dist. Court, N. Y.

[2] Vol. 2, Statutes at Large, p. 16.

How far the courts of the United States would be justified in holding lawful the captures made by insurgent privateers,—by decreeing salvage upon the recapture, and restitution of the captured property, —by reason of the executive action of surrender as prisoners of war, under the law of nations, of captured privateers, who are declared to be pirates by the municipal law, may admit of serious doubt.

The right vested in a sovereign nation, engaged in the duty of suppressing an insurrection which has assumed the proportions of a civil war, of regarding and treating the insurgents, either as rebels or as belligerents, is a right to be exercised by the executive branch of the government, and, from its very nature, by the Executive alone.

It is a right, to be exercised precisely according to the dictates of a varying political policy. If, therefore, the Executive, at one time, sees fit to allow an exchange of captured rebel privateers, as prisoners of war, it by no means follows that such executive action should be taken as a precedent for a subsequent judicial decree, because, at an after period in the progress of the war, the current of events may have produced an entire change of political policy.

Certain rebel privateersmen, assuming to act under commissions from Jefferson Davis, were captured while committing piratical raids upon the ocean, by a United States government cruiser, and carried into the port of Philadelphia. They were there tried in the Federal court, and convicted as pirates, under the municipal law. By Executive interposition, their *status* as convicted pirates, liable to be hanged, was changed to that of prisoners of

war. This was in the summer of 1861. If, at any subsequent period, *The Alabama*, or any other rebel cruiser, should be captured, and brought into a port of the United States, would this former Executive action, make it any less the duty of the Federal courts, to proceed against her crew as pirates, under the municipal law, and to visit upon them its severest penalties, unless that branch of the government which controls its political policy, should again interpose? Surely not.

When the executive department of the government recognizes the belligerent *status* of the people of a foreign nation, it is the duty of the courts to follow such recognition, in their judicial action, because it is the announcement of a permanent political policy, by that department whose province it is to determine such policy.

But the surrender of traitors or pirates, as prisoners of war, in the progress of a civil conflict, cannot be regarded in any such light. It is an act which is the result of a temporary policy merely, a policy that may not, and should not, control, the duty of judicial tribunals, to continue to regard the insurgents as traitors, punishable by the municipal law.

In the former edition of this work, it was stated that salvage was not awarded to a public ship, for the recapture from the enemy of another public ship or vessel, employed in the public service.

Such is the law of England. By the 2d section of the act of Congress last cited, salvage by the law of the United States, is granted upon the recapture of a public vessel, which "shall appear to have before belonged to the United States," in like manner

as the same is allowed upon the recapture of private property.

The reason for the distinction, as established by the authorities in the English law, is, that the recapture of a vessel employed in the service of the government, is an obligation of a vessel of war, lying in the direct path of the duty in which it is engaged—a duty of the same character, and equally imperative as that of rendering aid to a ship of war in battle.

The soundness of this reason for witholding compensation as salvage, for the recapture of a public vessel, is readily recognized; but as just ground for the distinction, between the recapture of public and private vessels, it is not so easily appreciated.

Can it be said to be any less the duty of the naval forces of the government to succor, and protect the ocean commerce of its citizens, than it is to protect public property upon the seas? Indeed, is not the duty, considered simply as an obligation, of precisely the same character, differing only in degree?

The capture of a merchant vessel by a belligerent cruiser, is a blow struck at the wealth and consequent means of resistance of the adversary. By the recapture, this blow is averted.

It is the paramount duty of a vessel of war to go to the aid of another, in battle with the enemy; and in doing so, to leave a captured merchant vessel in the possession of an enemy's cruiser. The importance of success in the naval conflict exceeds that of the recovery of the merchant vessel. But, suppose the merchant vessel to be not only laden with a precious cargo, but to be freighted with millions of treasure, it is easy to perceive that the import-

ance of her recapture might, for the moment, outweigh that of aid in the pending battle.

It is obvious, therefore, that the duty of recapture by a public vessel, is applicable no less to private than to public property, and the policy which withholds salvage compensation for the performance of this duty in the one case, is precisely the same as it is in the other.

An attempt was made at the last session of the Congress of the United States, to obtain a repeal of the act providing for the payment of salvage in cases of recapture, except upon the recapture of neutral property.

The wisdom and justice of such repeal would seem to be too apparent to justify opposition.

JOINT-CAPTURE.

[Since the publication of the former edition of this work, no other change has been effected in the laws of the United States, in relation to joint-capture, than by the statute provision, which substitutes the words "within signal distance" for the words "in sight," in the designation of the vessels entitled to share as joint-captors of a prize.

If it were the purpose of this change to render the designation more definite, it may be doubted if such purpose has been accomplished.

What is to be regarded as "signal distance," is a question for judicial determination; and it is apparent that this determination must vary with the varying circumstances of fog, and storm, and darkness, and intervening obstructions, which may be the attending incidents of a capture.

The rights of joint-capture by the concert and material co-operation of vessels which are neither in sight, nor within signal distance, at the time of the capture, of course remain unaffected by the statute provision.

In several important cases of capture made in the Gulf of Mexico, by the United States vessel of war *New London*, during the present war in the United States, the public ships, *Massachusetts* and *R. R. Cuyler*, were admitted, by judicial decree, to the rights of joint-captors, though not in sight or within signal distance when the captures were made, solely in recognition of their rights as co-operators, by previous concert.[1]

RESCUE.

[In the former edition of this work, it was stated, that if a neutral vessel of commerce should be captured by a belligerent cruiser, and a small force be placed on board, with a prize master, to carry her into port for adjudication, an attempt on the part of the master and crew of the captured vessel should be made to effect a rescue; such attempt would, of itself, subject the vessel to condemnation, which might otherwise be entitled to restitution.

Such is unquestionably the well-settled law of nations.

It is thus distinctly declared, by that learned master of prize law, Mr. Justice Story, in his brief but valuable treatise on prize law, published in the American Encyclopedia.[2]

[1] *Vide* MS. Decisions—the steamer *Henry Lewis*, the steamer *Anna*, and seven other vessels—U. S. Dist. Court, New York.

[2] Am. Enc., Vol. 10, p. 355.

"The right of search draws after it the right to capture and send in the visited ship for adjudication, whenever (though the ship and cargo are under neutral papers) there are circumstances of just suspicion, as to her real character.

"The neutral, under such circumstances, is bound to submit, and wait the regular result of the adjudication of the proper tribunals. If, after the capture, the neutral crew rise, and regain the neutral ship from the possession of the captors, that alone is a hostile act; and however innocent in other respects the ship and cargo may be, they are justly subjected thereby to confiscation."

A lawful rescue can only be made by a captured belligerent.

Such a rescue is deemed a meritorious act, because purely voluntary on the part of those captured, and not their duty, as is that of recapture, which is the recovery by a friendly force, of a prize taken by, and in the possession of, an enemy.

Such being the established rule of international law, its repudiation was not to be expected on the part of a great nation whose authorities and precedents have, more largely than any other, contributed to the erection of that beautiful fabric, which upholds the great commonwealth of civilized states.

The British ship, *Emily St. Pierre*, in attempting to violate the blockade of the port of Charleston, South Carolina, was captured by a lawful cruiser of the United States government.

A prize master, with a small force, were placed on board, and proceeded to conduct the prize into a port of adjudication.

Relying too much upon the good faith and sense

of obligation to the supreme law, of the captured master and his crew, the captors humanely forebore to render an unlawful rescue impossible, by a confinement of their persons.

Had any well-grounded suspicions existed, of a want of that integrity, which the captors had a right to require, their rigid confinement would have been perfectly justifiable.

Taking advantage of their superior numbers, and of the generous but misplaced forbearance of the captors, the captured master and crew, forcibly and fraudulently, regained the possession and control of the ship, and with the prize master, and his small force on board, proceeded with her to Liverpool, England.

Arriving there, it might not unreasonably have been expected, that the public authorities, indignant at this flagrant outrage by a neutral upon belligerent rights, would have needed no prompting to induce their immediate and efficient vindication of the violated law.

But the ship was a British ship, and was laden with a cargo which served to feed British manufactories. And this infraction of public law, this act so criminal by the law of nations, as of itself to subject the vessel and cargo to confiscation, was hailed, by common consent, as an act of commendable bravery, not only lawful, but highly meritorious and honorable.

At public assemblages, receiving the sanction of public men, this British ship master and his crew, were laden with encomiums, and rich pecuniary rewards, and the world has yet to learn of the utterance of any word of disapprobation of this

hostile act, by the neutral nation of the guilty subjects.

The minister of the belligerent nation, resident at the Court of St. James, lost no time in calling the attention of Her Majesty's government to the subject. The writer has not had an opportunity of consulting the correspondence which ensued between Mr. Adams and Earl Russell—but it is understood that the expectations expressed by the former, that the British government would direct the surrender of the captured property, and the arguments and authorities urged as the basis of his expectations, were met by a peremptory denial of the obligation on the part of the latter.

Upon the commencement of the civil war in the United States, Great Britain hastened to announce her position, as that of neutrality, between lawful belligerents.

The proclamation of the Queen was forthwith issued, in which it was said: "We have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties." And again, in this same proclamation, the British queen says: "We do hereby warn all our loving subjects, and all persons whatsoever, entitled to our protection, that if any of them shall presume, in contempt of this, our royal proclamation, and of our high displeasure, to do any acts in derogation of their duty, as subjects of a neutral sovereign in the said contest, or in violation or in contravention of the law of nations, as for example," "by breaking or attempting to break any blockade, lawfully and actually established by or on behalf of either of the said contending parties, all persons so

offending, will incur and be liable to the several penalties and penal consequences, by the law of nations in that behalf imposed and decreed."

And in the same proclamation the British queen adds:

"And we do hereby declare that all our subjects, and persons entitled to our protection, who may misconduct themselves in the premises, will do so at *their peril*, and of *their own wrong*, and that they *will in no wise* OBTAIN ANY PROTECTION FROM US *against any liabilities or penal consequences*, but *will, on the contrary, incur our high displeasure* by such misconduct."

If the law of nations, upon the subject of the rescue of a captured neutral vessel, for the violation of a belligerent blockade, has been here correctly stated, it would be a hopeless task to reconcile the course of the British government in the case of the *Emily St. Pierre*, with a sincere regard for the obligations of neutrality under the law of nations, or with the solemnly proclaimed determination of the British Queen, that her subjects offending against that law, "*will in no wise obtain her protection.*"

CHAPTER V.

Of the Effect of War upon the Commerce of Neutrals—and herein of Blockade—of Contraband of War, and of the Right of Visitation and Search.

Who are neutrals.

Neutral nations are those which, in time of war, take no part in the contest, but, maintaining a strict impartiality between the belligerents, render assistance to neither.

Their general commercial rights.

The general commercial rights of neutrals have been thus stated by Lord Erskine in his speech of March 8th, 1808, upon the orders in council: "The public law establishes, that countries not engaged in war, nor interposing in it, shall not be affected by the differences of contending nations; but, to use the very words of the eminent judge who now presides with so much learning in the Court of Admiralty (Sir Wm. Scott—Lord Stowell), 'upon the breaking out of war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded ports, or in contraband articles, and of their ships being liable to visitation and search.'"

Under this succinct but comprehensive statement of the general commercial rights of neutrals, the subjects for consideration in this chapter are clearly indicated. It is the right of neutrals to carry on *their accustomed trade*, which suggests the first topic for review.

Coasting and colonial trade.

It has ever been the policy of nations to preserve, with jealous exclusiveness, for the benefit of their

own citizens, the traffic carried on between ports of their own coast, and, as far as practicable, that with their colonial possessions.

It has been the practice, in time of war, for the belligerent, to permit neutrals to enjoy this commerce.

The impossibility of determining whether such permission is granted in good faith and with honest designs, or whether it is, as it is well known to be, in the vast majority of cases, a permission allowed with the collusive and fraudulent design of protecting the enemy's property by a neutral shield, and the incessant liability to abuse, incident to such permission, has resulted in the establishment of the general principle of total exclusion of neutrals from the enemy's coasting and colonial trade.

Neutrals excluded therefrom.

Under this general rule of exclusion, it is considered, that when a neutral presents himself in the capacity of a trader from port to port, or with the colonies of the enemy, he presents himself as an ally, as a willing and active instrument of the enemy, rather than as a neutral. He is regarded as departing from the line of impartiality which distinguishes a neutral, by engaging in the business of relieving one belligerent from the extremities to which he has been reduced by the lawful operations of the other—and being so regarded, is so accordingly dealt with.

Character and reason for the rule of exclusion.

The character and the reasons for the rule of exclusion of neutrals from a commerce in war, which they have been unaccustomed to enjoy in time of peace, are clearly and ably set forth by Lord Stowell in an early case involving the question:

"Is there nothing," said he, "like a departure from the strict duties imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act and by an interposition, neither known nor permitted by that enemy, in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice?

"As to the coasting trade, supposing it to be a trade not usually open to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war, than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said, that this is not importing any thing new into the country, and it certainly is not: but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north, for the supply of the manufacturers and for the necessities of domestic life in this metropolis, is it possible to describe a more direct and more effectual opposition to the success of French hostility, short of an actual military assistance in the war?"

The duties of neutrals are clearly expressed by Lord Herrick's letter to Mr. Rist in the following words:

"Neutrality, properly considered, does not consist in taking advantage of every situation between belligerent states, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage in the war, to either; and particularly, in so far restraining its trade to the accustomed course, which is held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities. The duty of a neutral is '*non interponere se bello, non hoste imminente hostem eripere*,' and yet, it is manifest, that lending a neutral navigation to carry on the coasting trade of the enemy, is in direct contradiction to this definition of neutral obligations, as it is, in effect, to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British navy; to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace."[1]

Consequence of its violation, and modern relaxation of the ancient rule of confiscation.

A violation of the rule of exclusion of neutrals from the coasting trade of the enemy, was formerly visited with the penalty of confiscation of the neutral property.

In modern times, and by special ordinances, the penalty for such violation has been limited to the forfeiture of the freight, which, we have seen (when

[1] *The Emanuel*, 1 Rep., 296.

considering the general subject of captures), would be payable, under ordinary circumstances, by the captor to the neutral ship-owner. This relaxation of the former rule, is regarded as a great leniency to the neutral, detected in interfering with a trade not legally permitted to him, which formerly subjected his vessel to confiscation as well as his freight to forfeiture.

The ancient law upon this subject, and its modern modification, are admirably collated and digested by the king's advocate, in an important case in the British admiralty, to which case as well as to another, Dr. Robinson, the reporter, has appended a valuable note.[1]

Ancient rule still applied in cases of specific fraud.

The relaxation, however, of the ancient penalty is not permitted to be applied, where there are circumstances of specific fraud on the part of the neutral, in addition to the illicit character of the trade in which he is engaged—such as the carrying of false papers. In such cases the ancient rule of confiscation is applied in all its rigor.[2]

Rule of exclusion of neutrals from the colonial the same as from the coasting trade of belligerents.

Analogous in principle to the rule which excludes neutrals from the coasting trade of a belligerent, is that which excludes them from the colonial trade. In a case already cited, Lord Stowell, with his usual learning and clearness of statement, discusses the policy and reasons of the rule of pro-

[1] *The Johanna Tholen*, 6 Rob., 72; *The Edward*, 4 Rob., 58; *The Huffnung*, 2 Rob., 68; *vide* also Dr. Robinson's note to that case, and also another note to case in 6 Rob., 250.

[2] *The Ebenezer*, 6 Rob., 252; *The Carolina*, 3 Rob., 75; *The Phœnix*, 3 Rob., 191.

hibition of neutrals from the colonial trade of belligerents, as follows:[1]

"Upon the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with the exception of the particular cases of a trade to blockaded ports, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search, in which case, however, they are entitled to freight and expenses.

"I do not mean to say, that in the accidents of war, the property of neutrals may not be entangled and endangered. In the nature of human connections, it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce.

"The trade of the belligerents is usually interrupted, in a great degree, and falls in the same degree, into the lap of neutrals. But, without reference to accidents of the one kind or the other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use or habit, in times of peace, and which, in fact, can obtain in war by no other

[1] *The Emanuel*, 2 Rob., 197; *vide* also Lord Erskine's speech on the Orders in Council, March 8th, 1808.

title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title. And such I take to be the colonial trade, generally speaking.

"What is the colonial trade, generally speaking? It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs; and this is a double use—that of supplying a market for the consumption of native commodities, and that of furnishing to the mother country the peculiar commodities of the colonial regions. Upon the interruption of a war, what are the rights of belligerents and neutrals, respectively, with regard to colonial territories? It is an indubitable right of a belligerent to possess himself of such places, as of any other possession of the enemy. This is his common right; but he has the certain means of carrying such right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it. He can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, true it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits, prevent its progress; you have, in effect, and by lawful means, turned the

enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere, but we will interpose to prevent his absolute surrender by the means of that very opening which the prevalence of your arms has effected. Supplies shall be sent, and their products be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure—not for your own interest, but for the common benefit of others. Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure, not of French counsels, but of British force." Upon these grounds, sentence of condemnation was ordered in the case under consideration. And in a subsequent case, the doctrines thus enunciated by Lord Stowell, were fully confirmed by the Court of Appeal, in which the Lord Chancellor pronounces the opinion thus decisively:

"It has already been pronounced to be the opinion of this court, that by the general law of nations, it is not competent in neutrals to assume in time of war, a trade with the colony of the enemy which was not permitted in time of peace; and

under this general position, the court is of opinion that this ship and cargo are liable to confiscation."[1]

When the colonial trade is permitted to neutrals in time of peace, the rule of prohibition does not operate in time of war.

The rule which prohibits neutrals from engaging in the colonial trade of belligerents, rests upon the assumption that their permission to do so by the parent of the colony, results from a relaxation on its part of the rule of exclusion from such trade in time of peace. Where, therefore, previously existing commercial relations, resulting from treaty or otherwise, permitted such commerce in time of peace, the doctrine of prohibition in time of war does not apply.

So it was held, in the case of a neutral ship, sailing between France and Senegal, then a French colony—it having been ascertained, upon much investigation, that France had been accustomed to leave open the trade of Senegal to foreign ships, as well before as after the war—that the vessel should be restored to the neutral claimants.[2]

The establishment of the republic of the United States the origin of the relaxation of the rule of prohibition.

The rule of prohibition of trade by neutrals with the colonies of the enemy, was first established in a case which arose in 1756, and is therefore called "the rule of 1756." The relaxations of the rule originated chiefly in the great change which took place in the commerce of the world, by the permanent establishment of the independent republic of the United States on the continent of America.

By reason of that event, the ships of the United States were admitted to trade in some articles, and on certain conditions with the colonies both of England and France. Such were the established com-

[1] *The Wilhelmina*, 4 Rob., Appendix 4.

[2] *The Juliana*, 4 Rob., 321.

mercial relations between the countries in time of peace. The application of the strict rule of prohibition would therefore have operated to abridge the acquired and customary commerce of Americans.

By reason of representations made by the United States government, orders were issued in 1794 by Great Britain during the then existing war with France, apparently designed to direct British cruisers to exempt American ships from capture, which were trading between their own country and the French colonies. In consequence of this relaxation in favor of the United States, it was in 1798 further extended by concessions in favor of the neutral states of Europe.

By this relaxation of the rigid rule of prohibition, neutral vessels were allowed to carry on a direct commerce between the colony of the enemy and their own country.

The application of the rule, and the exceptions in particular cases.

This is the extent of the relaxation, and upon the rule and the exceptions much discussion has arisen in many important cases.[1]

In a case before cited, it was determined that trade was unlawful carried on directly between the colony and the parent state of the enemy.[2]

So, too, was held to be a trade between the country of the enemy and the colony of his ally. And a trade between the settlement of one enemy to the colony of another, was decided to fall within the same principle.[3]

Under the judicial construction of the relaxation of the rule, it was held, that a neutral ship trading

[1] *The Emanuel*, 2 Rob., 186. [2] *The Rose*, 4 Rob., App.

[3] *The New Adventure*, 4 Rob., App.; *The Wilhelmina*, 4 Rob., App. 4.

between a hostile colony and European port, which was neither a port of the neutral nor of the nation of the captor, was not within the terms of the exception, and a condemnation ensued.

But in two other cases of United States ships, captured on voyages from a hostile colony in the West Indies to a neutral West India colony, the exception was applied and the ships were released.[1] This was rather upon the letter of the instructions to cruisers, than from the true spirit of the exception, which would seem to have justified their confiscation. But the instructions directed the capture only of ships coming from the hostile colonies to Europe.

In another case of a Swedish ship, captured on a voyage from a hostile colony to a neutral American port, the court refused to apply the exception, and the ship was condemned.[2] The only apparent difference between this and the two preceding cases is, that they were American, and the latter was a Swedish ship. Certainly the one was not more than the other out of the letter of instruction, and not within the spirit of the exception to the rule of prohibition. In another case, in which a ship was captured on a voyage being made in good faith between a hostile colony and the port of the neutral, it was held to be the precisely excepted case, and the vessel was restored.[3]

In another case, a capture was made of a vessel trading with a hostile colony, and it was urged against her restitution that the trade with that

[1] *The Hector*, 4 Rob., App.; *The Sally*, ib.

[2] *The Lucy*, 4 Rob., App.

[3] *The Margaretha Magdalena*, 2 Rob., 138.

colony was not generally open in time of peace to neutral ships, but was only permitted by special licenses. A more liberal interpretation of the instructions incorporating the exception was adopted by the court, and the vessel was released.[1]

In another case, however, of very great importance, and which was very elaborately contested, the court refused to admit the application of the exception contained in the instruction, although the case was manifestly within the letter of the instructions. It was the case of a contract made between a neutral merchant of Denmark and the Dutch East India Company. The voyage was to Copenhagen, the port of the neutral merchant; but the evidence in the case satisfied the court that the object of the contract was, to secure Dutch property from British hostility; and further, that a commerce conducted with such views, and facilitated by the enemy with extraordinary privileges, and carried on upon a scale so immense, could not be considered a neutral traffic.[2]

Rule prohibiting circuitous trade by neutrals, where the direct trade is unlawful.

It is an established rule, and a very important one, that the colonial trade which a neutral may not carry on directly, he is prohibited from conducting circuitously. "An American," says Lord Stowell, "has undoubtedly a right to import the produce of the Spanish colonies for his own use; and, after it is imported, *bona fide*, into his own country, he would be at liberty to carry it on to the general commerce of Europe."[3] But the question, what

[1] *The Providentia*, 2 Rob., 248.

[2] *The Rendsbery*, 4 Rob., 121.

[3] *The Polly*, 2 Rob., 361; 1 Acton, 171; *vide* also *The Maria*, 5 Rob., 365.

shall be considered a fair importation for the use of the neutral, and what shall be regarded as a mere colorable importation to protect the enemy's property, is one of great nicety, and difficult of determination. In various cases, this question has been very learnedly discussed; but in none, perhaps, more so than upon an appeal to the lords commissioners, in which the master of the rolls gave an elaborate judgment, in which the whole doctrine is illustrated with great ability.[1]

In an official correspondence between Lord Hawksbury and Mr. King, on the part of the United States, in 1801,[2] the proceedings of the British court of admiralty upon this question was made the subject of complaint, in consequence of which the advocate-general of England, on the 16th of March of that year, made an official report as to the law concerning the colonial trade.

He says: "The general principle concerning the colonial trade has, in the course of the present war, been relaxed to a certain degree, in consequence of the present state of commerce. It is now distinctly understood, and has repeatedly been so decided by the high Court of Appeal, that the produce of the colony of an enemy may be imported by a neutral into his own country, and may be re-exported thence, even to the mother country of such colony; and, in like manner, the produce and manufacture of the mother country may, in this circuitous mode, legally find their way to the colony.

[1] *The William*, 5 Rob., 387.

[2] *Vide* also 1 Kent's Com., 90; Mr. Monroe's Letter to Lord Mulgrave; and Mr. Madison's Letter to Messrs. Monroe and Pinckney.

"The direct trade, however, between the mother country and her colonies, has not, I apprehend, been recognized as legal, either by his majesty's government, or by his tribunals.

"What amounts to a direct trade, and what amounts to an immediate importation into a neutral country, may sometimes be a question of some difficulty. A general definition of either, applicable to all cases, cannot well be laid down. The question must depend upon the particular circumstances of each case. Perhaps the mere touching in the neutral country, to take fresh clearances, may properly be regarded as a fraudulent evasion; and is, in effect, a direct trade; but the high Court of Admiralty has expressly decided (and I see no reason to expect that the Court of Appeal will vary the rules) that landing the goods, and paying the duties in the neutral country, breaks the continuity of the voyage, and is such an importation as legalizes the trade; although the goods be reshipped in the same vessel, and on account of the same neutral proprietors, and forwarded for sale to the mother country or the colony."[1]

Penalty for violation of rule.

In cases of illegal colonial trade by neutrals, as well as in other cases of illegal commerce conducted by them, the penalty, in case of capture, is confiscation. It was formerly the rule in such cases, that the neutral ship should be restored, and the cargo only confiscated; but the strict rule of confiscation of both ship and cargo is now well established.[2]

[1] *Vide* Kent's Com., 92, note.

[2] *Jonge Thomas*, in a note to the report of *The Minerva*, 2 Rob., 229; *The Volant*, note to the report of *The Wilhelmina*, 4 Rob. App.; 1 Acton's R., 171.

There are some other commercial transactions which are frequently entered into by neutrals, of a nature so subject to abuse, that belligerents have considered themselves justified in discountenancing them.

Thus, where a neutral put in a claim upon a hostile ship which had been captured, averring that it had been purchased from him, and not paid for, and that he retained a lien on the property for the payment of the purchase-money, the court rejected the claim, saying: "Such an interest cannot be deemed sufficient to support a claim of property in a court of prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just outstanding claims between other parties, which can have no operation as to them."[1]

Silver was shipped by a hostile merchant, to his agent in Hamburg, as it was asserted, for the payment of an American neutral. The claim of the neutral was disallowed against the captors.[2] "For," said the court, "even if the asserted intention on the enemy's part were ever so sincere, it always remained revocable. The hostile merchant retained the power of converting it to any purpose of his own, and the neutral merchant had no document whatever, giving him any control over it. Under these circumstances, the hostile merchant must be taken to be the legal proprietor, and as his property, this silver must be condemned."

The question of free goods free ships.

The right to capture enemy's property on board a neutral ship, has been greatly contested by na-

[1] *The Marianna*, 6 Rob., 24. [2] *The Josephine*, 4 Rob., 25.

tions whose interests were opposed to the affirmance of such a right. In 1780, the emperor of Russia proclaimed the principles of what was called "the Baltic code of neutrality," to be maintained by force of arms. One of the articles of this code was, that all effects belonging to the subjects of belligerent powers should be considered free on board of neutral ships, except only such as were contraband. Sweden, Denmark, Prussia, Germany, Holland, France, Spain, Portugal, Naples and the United States acceded to the Russian principle of neutrality; but it was persistently and successfully opposed by Great Britain, and was abandoned in 1793. In 1801 another attempt was made by the Baltic powers to procure the adoption of the doctrines of armed neutrality, as set forth in 1780; but again it was defeated by Great Britain, and in June, 1801, a treaty was concluded between Great Britain and Russia, in which it was agreed that enemy's property was not to be protected on board of neutral ships. The whole subject is discussed with much ability by Mr. Wheaton in his excellent elementary treatise.[1]

The armed neutrality.

The conventional law upon the subject has undergone continual fluctuation, according to the varying interests and policy of maritime nations. In modern times, however, the preponderance of treaty stipulations is in favor of the maxim, *free ships, free goods*, sometimes, but not always, connected with the converse maxim, *enemy ships, enemy goods*.

Doctrine of the United States upon the sub-

During the war of 1812 between the United States and Great Britain, the prize courts of the

[1] Wheaton's Elements of International Law, 162, 183.

former nation with great uniformity enforced the principle of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom and the United States government, treaty stipulations existed agreeing to a different rule.

ject of free ships free goods.

While neutral powers, by the law of nations, are allowed to trade with the belligerents, in innocent merchandise, they are nevertheless prohibited from entering or attempting to enter for that purpose ports and places that are blockaded, and with which by virtue of the blockade, all commerce is interdicted. It is therefore of the highest importance to consider what is the character and true definition of blockade as established by the law of nations.

Blockade and its definition.

Blockade has been defined to be, the carrying into effect by an armed force, of that rule of war which renders commercial intercourse, with the particular port or place subjected to such force, unlawful on the part of neutrals.

There is no belligerent right more conclusively established in the law of nations, and certainly none more necessary or important in its application, than the right of blockade, as it has been defined, determined and practically executed in modern times. The right derives its origin from the highest and purest sources of maritime jurisprudence, is sanctioned by the practice of the most enlightened nations, and is justly regarded as one of the great bulwarks of a nation's security and independence.

The belligerent right of blockade.

However clear and indisputable may be the right of blockade, and however just and necessary may

be the exercise of the right, it must, nevertheless, be conceded to be one of the harshest measures in its operation of any known in the code of international law. It is for this reason, that, by the uniform practice of the tribunals of all nations, upon whom the duty devolves of giving effect to its provisions, certain requisites have been required to be established, in order to impart to the exercise of the right, its full force and validity. These requisites are deemed so indispensable to the legal existence of blockade, that the failure of either one of them has been uniformly considered to operate as an entire defeat of the measure, notwithstanding it may have been ordered and proclaimed by the supreme power of a nation.

Requisites to the lawful validity of blockade.

These requisites are clearly stated by Lord Stowell to be—"*First*, the existence of an actual blockade; *Second*, the knowledge of the party against whom proceedings are taken for its violation; and, *Third*, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade."[1]

Actual blockade requisite.

It will be convenient to consider the subject of blockade with reference to these three several prerequisites to its legality.

And first, the existence of an actual blockade.

The declaration of a blockade is an act of sovereignty which can emanate only from the supreme authority of a nation.

The commander of a national vessel or the commodore of a squadron cannot order it, unless under such circumstances as to impel the presumption

[1] *The Betsy*, 1 Rob., 29, *vide* also *The Nancy*, 1 Acton, 59.

that he carries with him such a portion of the sovereign authority as may be essential to provide for such an exigency.[1] But not only can no blockade exist as a legal fact which has not been declared by competent authority, but it must also have an actual physical existence. "The very notion of a complete blockade," says Lord Stowell, "includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, then there is no blockade of that part where its power cannot be brought to bear."[2]

By this, it is not intended that the blockading force must be at all times present, if the absence be temporary and accidental, and its cause known (as by being blown off the coast by tempestuous weather), but that the presence of the sufficient force, barring such accidents, must be continuous, and if not so, by reason of remissness on the part of the cruisers stationed to maintain it, it is considered as having no legal existence.[3] "It is in vain," says Lord Stowell, "for governments to impose blockades if those employed on that service will not enforce them. The inconvenience is very great, and spreads far beyond the individual case. Reports are eagerly circulated that the blockade is raised, foreigners take advantage of the information, the property of innocent persons is ensnared, and the honor of our country is involved in the mistake."[4]

[1] *The Henrick and Maria*, 1 Rob., 146; *The Rolla*, 5 Rob., 367.

[2] *The Mercurius*, 1 Rob., 80; *The Stert*, 4 Rob., 66, 1 Acton, 64.

[3] *The Frederick Molke*, 1 Rob., 86–93, 94, 147, 156, and 1 Acton, 59.

[4] *The Juffrow Maria Schroeder*, 3 Rob., 156, and note.

There is no limit to the right of a belligerent to blockade the ports of the enemy, but that which results from the deficiency of naval force. If a nation possess the power and resources, and will incur the hazard and expense, it possesses the right to blockade the entire coast of the enemy, upon the same principle which confers the right to blockade a single port, and is entitled thereby to the same exemption from neutral interference.[1] Such a blockade is undoubtedly rendered more practicable and efficacious in modern times by reason of the vast improvements in the construction, and navigation by steam, of ships of war.

Knowledge of the blockade requisite.

Not only must the blockade be ordered by the sovereign power of the nation, and be physically actual and complete, but to be legally valid and effectual, so as to subject a neutral to the penalty consequent upon its violation, it is necessary that he should be sufficiently informed of its existence.

There are two modes by which information may be communicated—either by formal notification by the blockading power, or by the notoriety of the fact itself.

All that is requisite to the sufficiency of a notification, is that it be communicated in a credible manner. Any such communication, whether formal or not, being such as to leave no doubt of its authenticity, is obligatory upon the neutral; but the practice of nations in modern times has been to disseminate such intelligence to the world by proclamation, so distinctly expressed, as to leave no room for the defence of want of information.[2] The

[1] Marshall on Ins., B. I.; c. iii., § 3; 1 Acton, 63.

[2] *The Rolla*, 6 Rob., 367.

legal effect of a notice officially given to a foreign government is, that it becomes binding upon every individual of that nation. "It is the duty of governments," says Lord Stowell, "for the protection of their subjects, to communicate the information which they have received, and no individual is allowed to plead ignorance of it. I shall hold, therefore, that a neutral master can never be heard to aver, against notification to his government, that he was ignorant of the fact."[1] It has been even held, that a formal notification to one nation, after the lapse of a reasonable time, will be presumed to have been received by the subjects of a neighboring nation, operating however, upon them, not from the time when it was formally given to the one nation, but from such period when it may fairly be presumed to have been received by the subjects of the other."[2]

It is well established that when notice of the blockade, either actual or constructive, is given, the neutral cannot lawfully go to the station of the blockading force, under the pretence of obtaining information of its continuance. "The merchant," says Lord Stowell, "is not to send his vessel to the mouth of the river, and say, 'If you don't meet a blockading force, enter; if you do, ask a warning, and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that, after the knowledge of an existing blockade, you are not

[1] *The Neptunus*, 2 Rob., 110; *vide* also *The Welvaart Van Pillaw*, 2 Rob., 128, and 1 Acton, 61.

[2] *The Adelaide*, 2 Rob., 110, and note; *The Jonge Petronella*, 2 Rob., 131; *The Calypso*, 2 Rob., 298.

to go to the very station of blockade upon pretence of inquiry."[1]

The rule, with regard to notification of a blockade, is somewhat relaxed on behalf of nations at a great distance from the blockading power; and this relaxation was made to operate favorably to adventures from America, during the war at the close of the last century, between France and Great Britain, by the tribunals of the latter nation.

It is not to be presumed that such a relaxation of the rule would now be permitted, since maritime nations have been brought into such proximity by ocean steam navigation.

A definite rule as to notification of a blockade, is established by the treaty of 1794, between the United States and Great Britain, in the following terms: "Whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

The receipt of notice of blockade will not operate to prevent a neutral from retiring without molestation from the blockaded port where she was lying at the time of such notification. And she may retire with a cargo on board, provided the

[1] *The Spes and Irene*, 5 Rob., 76; *The Betsy*, 1 Rob. 332; *The Neptunus*, 2 Rob., 114; *vide* also, 1 Acton, 141, 161.

same were actually laden, and had become neutral property at the time of the receipt of such notification. But where the notification of blockade gives to neutral vessels lying in the blockaded ports a certain number of days to retire, they are not at liberty to purchase cargo to be laden after such notification, even though they may retire before the expiration of the time limited in the notification. And a cargo actually delivered on board a neutral vessel, under such circumstances, after the notification, is, in law, deemed a fresh purchase.[1]

An actual notice of a blockade must be regular and specific, in order to be legal.

A blockade was ordered by Great Britain of the single port of Amsterdam, but a British commander notified a neutral about entering, that a blockade existed of all the Dutch ports. It was held to be an illegal and insufficient notice, even as to Amsterdam. "Because," says Lord Stowell, "it took from the neutral all power of election as to what other port of Holland he would enter, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral master to this kind of distress, and I am of opinion that if the neutral had contravened the notice, he would not have been subject to condemnation."[2]

A neutral may be charged with sufficient knowledge of a blockade to be binding upon his conduct without any formal notification, by the mere notoriety of the fact. Such formal notice is never requisite to neutrals lying in the blockaded ports. "The

[1] *The Rolla*, 6 Rob., 364; *The Betsy*, 1 Rob., 92, and 152.

[2] *The Henrick and Maria*, 1 Rob., 146; *The Rolla*, 6 Rob., 364.

continued fact," says Lord Stowell, "is a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce, the notoriety of the thing supersedes the necessity of particular notice to each ship."[1]

An important distinction has been recognized and acted upon in various cases, between a formal notification, through a notice to his government, or by notice to himself, and notification presumed from notoriety. In the former case, no plea of ignorance is ever permitted. In the latter, it is allowed to prevail, if actually established by the proof—and there is also this additional distinction that, in the case of formal notification, the mere act of sailing to the blockade, with a contingent design to enter, if the blockade be raised, is, of itself, a consummation of the offence of violation of the blockade, because, in the case of such a notification, the port is considered closed, until a formal revocation of the notification; but no such presumption arises where the notification is simply of the fact, by notoriety, and therefore, in such case, it is no offence for a neutral to pursue a voyage on a doubtful or provisional destination.[2]

But, in order to charge a neutral with liabilities incident to a blockade, there must be not only an actually existing legal and effectual blockade, and formally or constructively known, but there must be a violation of the blockade so existing and

[1] *The Vrow Judith*, 1 Rob., 152.

[2] *The Columbia*, 1 Rob., 146, 156; *The Mercurius*, 1 Rob., 83; *The Hurtige Hane*, 3 Rob., 324; *The Neptunus*, 2 Rob., 110.

known; and this leads to a consideration of the third branch of the subject, namely, what is a violation of a blockade. What is a violation of a blockade.

The breach of a blockade may be either by going into or coming out of the blockaded place with a cargo laden after the commencement of the blockade; but, in order to constitute such a going into the blockaded port as will subject a neutral to the penalties of confiscation, it is not necessary that the entrance be completed. If the vessel is placed in the vicinity, in a situation so near that it may enter with impunity when it pleases; and especially if the vessel be placed so as to be under the protection of shore batteries, it is considered a breach of the blockade. In such cases, it is regarded as a presumption *de jure*, that the vessel is so placed with an intention to violate the blockade; and notwithstanding that such a presumption may operate severely in individual instances of innocence, "yet," says Lord Stowell, "it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war."[1] The blockade may be violated as well by the coming out of the blockaded place as by going in. The cases of innocent egress are, where vessels, lying in the blockaded port at the time of the commencement of the blockade, retire upon notification, without taking a cargo on board, unless such cargo were laden before the blockade was effective; and so laden, upon purchase before made in good faith. If a cargo be subsequently laden, the act is consid-

[1] *The Neutralitet*, 6 Rob., 30; *The Charlotte Christine*, 6 Rob., 101; *The Gute Erwartung*, 6 Rob., 182.

ered fraudulent, and the egress of the vessel a violation of the blockade.[1]

A vessel coming out of a blockaded port, is, in all cases, liable to seizure, and the *onus* of proving innocent acts and intentions lies upon the claimant seeking restitution.[2]

A ship transferred from one neutral to another, in a blockaded port, and retiring in ballast, is not guilty of a breach of the blockade. And if a neutral have sent in goods, previous to the blockade, which have proved unsalable, he may withdraw them for the owner without violating the blockade.[3]

If a neutral purchase a ship of the enemy in a blockaded port, that alone is an illegal act; and she may be captured at any time on her voyage to the country of the purchaser, even though driven to an intermediate port by stress of weather, being considered *in delicto* to the termination of the voyage."[4]

What excuses a violation of blockade.

There are cases in which a violation of a blockade is excusable; but the burden of exoneration is always upon the party claimant setting up the excuse; and it is an invariable rule that, however innocent may have been the intentions of the party, his conduct must be explained, not only in such way as to manifest such innocence, but he must bring it within the principles which have been established for the protection of belligerent rights,

[1] *The Vrow Judith*, 1 Rob., 151; *The Frederick Molke*, 1 Rob., 87.

[2] *The Welvaart Von Pillau*, 2 Rob., 130.

[3] *The Potsdam*, 4 Rob., 39; *The Drie Vrienden*, 1 Dod., 269.

[4] *The General Hamilton*, 6 Rob., 61.

and without which, no blockade can be maintained.[1]

The invention of neutrals has been sufficiently fertile in providing excuses for a violation of blockade; such as want of provisions,[2] stress of weather,[3] to ascertain the land,[4] intoxication of the master,[5] the misinformation of foreign ministers;[6] but such excuses are rarely allowed, and are always scrutinized by courts of admiralty with the greatest suspicion.

Positive information from a ship belonging to the blockading nation, that a particular port is not blockaded, though the information were erroneous, has been received as a valid excuse, by a vessel acting upon such information.[7]

If a place be blockaded by sea, it is not considered a violation of the rights of the belligerent, for a neutral to carry on commerce with it by inland communications,[8] though such trade is not permitted by the citizens of the blockading power.[9]

The question of blockade in relation to rivers flowing through conterminous states, is very learnedly and elaborately discussed by Lord Stowell in a case on the capture of vessels in the Groningen Watt, on a suggestion that they were bound from Hamburg to Amsterdam, then under blockade; the claim being given under the authority of the Prussian minister, averring that the place in question was within the territories of the king of Prussia.[10]

[1] *The Arthur*, 1 Edwards, 203; *The Byfield*, ib., 188.
[2] *The Fortuna*, 5 Rob., 27; [3] *The Hurtige Hane*, 2 Rob., 124.
[4] *The Adonis*, 5 Rob., 256. [5] *The Shepherdess*, 5 Rob., 262.
[6] *The Spes and Irene*, 5 Rob., 79. [7] *The Neptunus*, 2 Rob., 110.
[8] *The Ocean*, 3 Rob., 297. [9] *The Jonge Pieter*, 4 Rob., 89.
[10] *The Twee Gebroeders*, 3 Rob., 336.

Inland countries are allowed to import and to export through the ports of the enemy, subject, however, to strict proof of property.[1]

Excuses for the violation of blockade, are listened to with a disposition to relax the severity of the law in favor of less civilized nations (like the kingdom of Morocco), whom it is considered should not be held bound by all the rules of the law of nations, as practised in more enlightened governments.[2]

Neutral merchants are not allowed to cover enemy's property with other goods belonging to them in the same ship. "The regular penalty of such a proceeding," says Lord Stowell, "is confiscation; for it is a rule of this court, which I shall ever hold till I am better instructed by the superior court, that if a neutral will weave a web of fraud of this sort, this court will not take the trouble of picking out the threads for him, in order to distinguish the sound from the unsound. If he is detected in fraud, he will be involved *in toto*. A neutral surely cannot be permitted to say: 'I have endeavored to protect the whole, but this part is really my property; take the rest, and let me go with my own.' If he will engage in fraudulent concerns with other persons, they must all stand or fall together."[3] It is no violation of a blockade, where a neutral owner, without knowledge of the fact, sends his vessel to the blockaded port, if the master, *bona*

[1] *The Magnus*, 1 Rob., 31; *The Active* (Lords, Mar. 10, 1798).

[2] *The Hurtige Hane*, 3 Rob., 324.

[3] *The Eenrom*, 2 Rob., 9; *vide* also *The Betsy and George*, 2 Gallison, 377; *The St. Nicholas*, 1 Wheaton, 417; and *The Fortuna*, 3 Wheat., 236.

fide, changes his course for another port, on information before capture.[1]

A neutral violating a blockade, is considered *in delicto* until the voyage is terminated. Until that period, the vessel may be captured and proceeded against in like manner as if taken while in the act of violation. This is a well-established principle laid down by the elementary writers, and has been frequently recognized and applied by admiralty tribunals; but if it so happen that the blockade be in fact raised after its violation, and before capture, the offence is held to be wiped away. To use the language of Lord Stowell: "When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*."[2]

Penalty for violation of blockade.

The violation of a blockade subjects the property employed to confiscation. This is the well-established rule in the law of nations.[3] A breach of the blockade by the master subjects the ship to confiscation, but not the cargo, unless the owner of the ship be also the owner of the cargo; or, unless the owner of the cargo, from cognizance of the intended violation, be considered *in pari delictu* with the ship-owner, or master, or supercargo.[4]

The penalty of a violation of a blockade, may attach on the property of persons ignorant of the fact, by the conduct of the master, or of the consignee, if intrusted with power over the vessel.[5]

[1] *The Imena*, 3 Rob., 169.

[2] *The Lisette*, 6 Rob., 395; Bynkershoek, Qu. jur. pub., Lib., I., c. xi., p. 214; *The Christiansberg*, 6 Rob., 376.

[3] *The Columbia*, 1 Rob., 154.

[4] *The Mercurius*, 1 Rob., 80; *The Eenrom*, 2 Rob., 8.

[5] *The Columbia*, 1 Rob., 154.

The doctrine laid down in the case of *The Christiansberg*, before cited, is not fully expressed in the preceding text.

It might, perhaps, be inferred, from the proposition—that a neutral, having violated a blockade, is considered *in delicto* until the voyage is terminated—that the vessel could not be captured and proceeded against by reason of the offence, at any subsequent period. This, however, is not so, unless a veil is thrown over the past offence by the raising of the blockade, before the succeeding voyage of the vessel.

The voyage next succeeding that upon which the offence has been committed, may be the first opportunity afforded for the vindication of the law, and the case of *The Christiansberg*, therefore, decides, that the liability to capture is not limited to the termination of the voyage of the offence, but continues through that which next succeeds it.

Two cases, confirmatory of this doctrine, are cited by the reporter in a note to the case of *The Christiansberg:* the case of *Parkman* vs. *Allen*, 1 Stairs' Decisions, 529; and the case of the *Randers Bye*, decided at the February term of the year of the report.

In the latter case, the authority of the case of *The Christiansberg* was invoked, in favor of a decree of condemnation—condemnation was refused—but the doctrine here stated was affirmed, by the refusal being placed solely upon the ground that between the voyage upon which the offence had been committed, and that upon which the vessel was captured, a short but distinct voyage had taken place.

Upon principle, there would seem to be no just

reason for holding the *delictum* to be at an end, by the mere arrival of the vessel at her destined port, upon the voyage of the offence.

The true ground upon which the offending vessel is, at any time during the existence of the blockade, absolved from liability, is, that the rights of third parties may have intervened, who should not be exposed to loss for the commission of an offence in which they did not participate, and of which they had no knowledge.

But when a vessel arrives at her destination, fresh from a blockaded port—having successfully run the gauntlet of the naval force, stationed for the protection of the belligerent right—the achievement is ordinarily so paraded as a triumphant and meritorious evasion of an obnoxious, if not tyrannous right, that the last employment of the vessel becomes matter of notoriety. No parties, therefore, who may see fit, then and there, to entrust their capital in the succeeding enterprise of the vessel, can be regarded in the light of innocent parties in that sense in which innocence consists of ignorance of the stain of guilt resting upon her, by reason of her recent and last employment.

The reason for the rule of limitation, in this view, would rarely, if ever, exist, until after the vessel had made a distinct voyage, subsequent to that of her offence.

There have been several occasions for the application of this doctrine, during the existing war in the United States, and it has been recognized and enforced by the learned judge of the United States Court, in the District of New York, although no case has occurred in which condemnation has been

decreed, solely upon the ground of violation of the blockade upon the voyage preceding that of the capture, because, in each case, other and distinct grounds of condemnation have also existed. The affirmation of the doctrine of the English cases, has, however, been so clear, as to leave no doubt that condemnation would have been decreed in a case where no other cause of capture was averred.

In March, 1862, the schooner *Elizabeth*, then at the port of Charleston, South Carolina, and owned by a citizen of that place, took on board a cargo of cotton, and successfully running the blockade of the port, arrived at the convenient neutral British port of Nassau, New Providence. At this port, her name was changed to *The Mersey*, and her nationality was ostensibly changed by a transfer to a British subject; and she was laden with a cargo consisting of articles of great scarcity at Charleston, but as common, and of not more value, than coals at Newcastle, in the port of Baltimore, to which port she was documented for a voyage. Upon this voyage she was captured, when two days sail from Nassau, by the United States cruiser *Santiago de Cuba*, and sent to New York for adjudication. It will be seen by this recital, that other grounds of capture were involved in the case; but the court, in assigning the causes upon which condemnation was decreed, indicates this as the second cause, in the words following:

"She came out of Charleston, by evading the blockade of that port, and was seized on her first voyage subsequent thereto." (*The Christiansberg*, 6 Rob., 376, 382, and notes. *The General Hamilton*, 6 Rob., 62.)

By the same learned judge, this was made a distinct ground and cause of condemnation in the case of the *Major Barbour*, captured in February, 1862, by the United States cruiser *De Soto*, on a voyage succeeding that upon which she successfully violated the blockade of the port of New Orleans.

Also, in the case of the *Joseph H. Toone*, captured October 1st., 1861, by the United States cruiser *South Carolina*, while (being documented for a voyage to Tampico), she was steering into Barataria Bay, a bayou connecting with the Mississippi River below New Orleans; and, having on the preceding voyage, in August, successfully violated the blockade of the port of New Orleans, by taking a cargo out of that port, by way of Berwick Bay, a place of which New Orleans is the port of entry and clearance, and connected with that port by a short railroad.

The question whether a neutral, knowing of the establishment of a belligerent blockade, may lawfully sail to the mouth of the blockaded port, river, or estuary, with the *bonâ fide* intent to inquire there, as to the continued existence of the blockade, has been made the subject of frequent and earnest discussion in several cases of prize, recently adjudicated, in the District of New York. (*Vide* vol. of MS., Decisions. *The Cheshire*,—*The Delta*,—*The Empress.*)

In the cases of *The Cheshire* and *The Delta*, the dishonesty of the approach to the blockaded port, was manifested, among other criminating circumstances, by the false destination of the vessels, as set forth in their papers.

The Cheshire was captured off the port of Savannah, Georgia. She was documented for a voyage from Liverpool to Halifax, or Nassau, not as ports of contingent destination, in the event of the blockade being found, upon inquiry, to be still in existence, but as ports of absolute destination, the design to deliver her cargo at Savannah in any event, being sedulously concealed.

The Delta was captured off the port of Galveston, Texas. She was documented for a voyage to the Mexican ports of Minatitlan, or Matamoras, as ports of absolute destination, not contingent upon finding Galveston still blockaded, no mention being made of Galveston.

In these cases, therefore, the question was not so directly presented, as in that of *The Empress*, which vessel sailed from Rio de Janeiro, upon a voyage to New Orleans, by the very terms of her charter, and all her papers, with written instructions, "if she found that port still under blockade, to turn away and proceed to the port of New York."

It will be seen that here was no direction *to inquire*, and not attempt an entry without inquiry, but to go to New Orleans, and there deliver her cargo, unless turned away by a blockading force.

This furnished grounds of suspicion of dishonesty of design, in the approach. And there were, in the case, in the opinion of the court, other and more pregnant grounds of suspicion of criminal intent. But the ground of simulation of papers, and false destination, regarded by Sir William Scott as so conclusive of dishonesty of purpose, in the case of *The Carolina*, 3 Rob., 75, was wanting here, and

therefore the question of the neutral right to approach the very port blockaded, for the honest purpose of inquiry, was more nakedly presented, and was earnestly and elaborately argued.

The doctrine laid down by Sir William Scott, in the case of *The Betsy*, 1 Rob., 322, and *The Spes and Irene*, 5 Rob., 76, was adhered to and affirmed by the learned judge in the following language:

"The earlier decisions of the prize courts indicated, that the *act of sailing* for a blockaded port, with knowledge of the blockade, was itself evidence of an attempt to evade the blockade; but the state of the law upon that point now is, that some overt act denoting the forbidden attempt, must be shown, in addition to an intention to commit such infraction, however strongly the latter may have been indicated and persisted in. (Phillips, on Ins., 459, art. 832, and cases cited; *Graves* vs. *U. S. Ins. Co.*, 1 Caines' Ca., 1; *Fitzsimmons* vs. *Newport Ins. Co.*, 4 Cranch, 410; 1 Kent, 148.)

"The rule is also so far mitigated in its application, that going purposely to a blockaded port, with the intention properly notified on the ship's papers, or otherwise fairly disclosed, to enter the port, may be excused in a neutral ship, if the object is honestly to inquire elsewhere, whether the blockade is still in continuance, and if so, to avoid the blockaded port, and complete the voyage at a lawful one. The hazard of allowing such privilege, and the necessity of observing the utmost ingenuousness in its indulgence, is emphatically noted in the authorities (Kent, 148, 149; 1 Duer, on Ins., 669, §§ 42, 43); and accordingly, the courts take heed, in administering it, that neutrals be not permitted,

under cover of that relaxation of prize law, to smother the principle, by placing themselves out of reach of its restraints.

"An adherence to the old rule would therefore seem to be still exacted, in its full simplicity, in one of its cardinal features, which is, that the neutral vessel shall make her inquiries so plainly clear of the blockaded port, that she shall not acquire the ability (as Chancellor Kent phrases the act) to '*slip herself into it.*'

"Phillimore states the general result of the authorities to be, that 'it has never, under any circumstances, been held legal that the inquiry shall be made at the very mouth of the river or estuary of the blockaded port' (3 Phillimore, 399, § 304).

"Dr. Lushington says, in the case of *The Union*, 1 Spinkes, P. C., 164, 'the claimants allege the vessel was chartered for Riga, and being uncertain whether the place was blockaded or not, they sent her to Riga to inquire of the blockading force whether Riga was blockaded. Is this justifiable? Under particular circumstances, perhaps, it may be justifiable, *where information cannot be otherwise procured*, to inquire of the blockading squadron; but the excuse can never prevail, if a neutral port be accessible, though an inquiry there might be attended with great loss and expense to the neutral ship.'

"Without further extending the examination into this branch of the defence, it is clear to my mind, that the claimants cannot lawfully, under claim of making inquiry if a port known to the vessel to have been under blockade when her voyage was set on foot, and after she had been prose-

cuting it toward the port, go forward to the entrance of the port, and within the actual line of the blockading force, to inquire as to the existence of the blockade, and that such act, by the law of nations, subjects her to condemnation as prize of war."

In deciding the question of the construction of the Executive proclamation, in the case of *The Admiral*, on appeal to the Circuit Court of the United States for the Third Circuit, from the decree of condemnation of the District Court of the United States for the Eastern District of Pennsylvania, the learned Circuit Judge says:

"The *Admiral*, with full knowledge that her destined port is blockaded, takes a clearance for St. Johns, and is found a thousand miles from the proper course to such a port, and in the act of entering the blockaded port, and when thus arrested for the first time, inquires if such blockade is raised."

"A vessel which has full knowledge of the existence of a blockade, before she enters on her voyage, has no right to claim a warning or indorsement when taken in the act of attempting to enter."

"It would be an absurd construction of the President's proclamation, to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade, and get that first information from the blockading vessels."

The purpose of a belligerent blockade being to interdict all commercial intercourse and trade with the enemy, such blockade is deemed violated by

any act on the part of neutrals, the obvious effect of which is, to defeat that purpose.

It has, therefore, been held in the cases before cited, and may be considered as established law, that a neutral vessel lying in a blockaded port, unladen or laden, at the time of the institution of the blockade, may *thus depart*, without infraction of the belligerent right; but that the act of taking in a cargo, after the blockade is established and known, is of itself a violation of the blockade, subjecting the property to confiscation.

This doctrine has been expressly recognized and applied in several cases adjudicated during the existing war in the United States.[1]

In the leading case of *The Tropic Wind*, decided in the Federal court for the District of Columbia, upon this point the learned judge says:

"All the testimony concurs in showing that the cargo was laden on board *The Tropic Wind* on the 13th and 14th days of May, 1861. No principle of prize law seems better settled than that such lading violates the blockade and forfeits both vessel and cargo. In 'Weldman, on Search, Capture, and Prize,' p. 42, the act of egress is declared to be 'as culpable as the act of ingress; and a blockade is just as much violated by a ship passing outward as inward. A blockade is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that, having already taken in a cargo *before the blockade begins*, she may be at lib-

[1] *Vide The Hiawatha*, *The Lynchburg*, *The Crenshaw*, MS. Decisions U. S. Dist. Ct., New York.

erty to retire with it. If she afterward takes on board a cargo, it is a fraudulent act, and a violation of the blockade. It is lawful for a ship to withdraw from a blockaded port in ballast, or with a cargo shipped *bonâ fide* before notice of the blockade.' (See also *Vrouw Judith*, 1 Robinson, 150; *The Juno*, 2 Robinson, 119; *The Nostra Senhora*, 5 Robinson, 52.) In 'Weldman's International Law,' volume 2d, p. 205, we find this passage: 'Where the blockade is known at the port of shipment, the master becomes an agent for the cargo; in such case, the owners must, at all events, answer to the country imposing the blockade, for the acts of persons employed by them; otherwise, by sacrificing the ship, there would be a ready escape for the cargo, for the benefit of which the fund was intended.'" (See also *The James Cook*, Edwards, 261; *The Arthur*, *ib.*, 202; *The Exchange*, *ib.*, 40; 1st Kent., 2d edition, 144, 146; *Olivera* vs. *Union Insurance Company*, 3d Wheat. Rep., 194. See also Wheaton's note to the same case.)

The principle upon this point, to be extracted from the authorities, may be thus briefly stated:— A belligerent blockade is designed to interdict exportation from, as well as importation to, the blockaded port. The act of taking on board a cargo in a blockaded port—even though not followed by an overt attempt at egress, is of itself a violation of the belligerent right, subjecting the property to condemnation—because it is an act of direct assistance of the traffic of exportation—the presumption of intent to violate the blockade—in the absence of countervailing evidence, from the mere fact of taking in a cargo.

Distinction between the blockade as a belligerent right, recognized by international law, and that proclaimed by the United States government of a portion of its own ports, and the effects of that distinction.

The intelligent reader cannot fail to perceive that the blockade ordered by the proclamations of the President of the United States, of the 19th and 27th of April, 1861 (*vide* appendix), of the ports of that portion of the territory of the United States whose people are in a condition of insurrection against the government, bears no resemblance, in purpose or character, to the blockade known to the law of nations, and recognized as one of the rights of war, which sovereign belligerent nations may exercise against each other. The established rules by which the questions are determined, of what constitutes a violation of a blockade, and what are the penalties for such violation, would no doubt be alike applicable—but here all analogy ceases. To the failure to perceive, or at least to acknowledge, this entire want of analogy, a failure which cannot but be regarded as singularly unaccountable in such distinguished publicists as the Earl of Ellenborough, the Earl of Derby, and Lord Brougham (*vide* Debates in the British House of Lords, of May 16, 1861), may be fairly attributed the unfortunate position assumed by the British government toward the rebellion existing in the United States.

The blockade known and recognized as such by the law of nations, is the exercise of the right possessed by belligerent nations as a lawful right of war, to close the ports of its adversary by an efficient force, thereby to inflict a blow upon its trade and commerce, and so to cripple its means and resources, as eventually to compel a pacification by a reparation of those injuries which constituted the *causa belli*. When a nation, for any cause, sees fit

to order the closing of any of its own ports, it is perfectly obvious that such an act cannot be induced by any such motive—that it is not, in any manner the exercise of a technical belligerent right, but is simply the exercise of that power, inherent in every nation, to regulate and control its internal affairs in such manner as it may deem best calculated to promote its interests, its safety, its existence.

The learned peers of England assume that the blockade ordered by the government of the United States, is the exercise of a strictly technical belligerent right, and therefore that that government ought not, and has no right to complain, if foreign nations extend towards the rebellious people whose ports are closed by the blockade, the rights of lawful belligerents. These consist of the right of commissioning private vessels of war, by letters of marque, to seize and condemn as lawful prize of war, the vessels of the blockading power, without subjecting the captors to the penalties of piracy denounced by the proclamation of the United States government. And also the right of such letters of marque to seek and claim the shelter and asylum of the ports of Great Britain as a neutral nation, with such prizes as they may capture, there to be protected until a court of admiralty of their own jurisdiction may pronounce a lawful sentence of condemnation, for it is now a settled principle of international law, that where no special treaty provision intervenes (and none such exists between the United States and Great Britain), a neutral nation has no power to interfere with the prizes brought into its ports by the vessels of either of the lawful belli-

gerent parties—(*vide* Robinson's Coll. Mar. p. 30, *et seq.;* Loccenius de Jur. Mar., Lib. II., c. iv., § 7; De Martens, Liv. VIII., c. vii., § 312; Manning's Law of Nations, p. 387, *et seq.*) In this assumption of the learned peers lies the great error.

The preamble to the proclamation of the President of the United States, of April 19th, 1861 (to which that of the 27th of the same month is merely supplementary), very briefly, but with perfect precision, recites the causes which are the occasion of the measure. They are two-fold. First, that an insurrection exists in that portion of the nation in which the ports are ordered to be closed, which operates to prevent the execution of the laws of the nation for the collection of the revenue, passed pursuant to a provision of the Constitution of the United States requiring a uniformity in the duties imposed upon importations; and, second, that the persons engaged in the insurrection, by a most unwarrantable assumption of the rights of lawful belligerents, threaten to issue letters of marque, authorizing those to whom they are granted to assault the persons, and seize and confiscate the vessels and property of citizens of the United States engaged in commerce upon the seas.

It is therefore solely for the purpose of securing the uniform enforcement of its own revenue laws, enacted pursuant to the provisions of its own constitution, and to prevent, as far as possible, one portion of its people from committing piratical depredations upon the lives and property of the others, that this most salutary order is proclaimed, as a measure of domestic peace, and of national security.

No one, surely, whose intelligence is not clouded by prejudice, or obscured by selfish considerations, can fail to perceive the broad distinction between that blockade which is proclaimed by a sovereign nation, of a portion of its own ports, for the purpose of quelling a domestic insurrection, and compelling the misguided insurgents, to "unthread the rude eye of rebellion, and welcome home again discarded peace," and that which is ordered and enforced by a sovereign government of the ports of its foreign enemy, for the purpose of paralyzing his power, and compelling him to repair his wrongs, and submit to the terms of equitable pacification. The latter is the technical belligerent right, the right of war, the right of a sovereign government, recognized by the law of nations, to inflict a blow upon the commerce of the adversary, although it be with the incidental abridgment of the accustomed commerce of neutral nations.

The former, while it is also a belligerent right resulting from a state of war, is the right which every nation possesses by the law of nature, which is above and beyond all mere international prescriptions, the great law of self-preservation, to take all such measures, and adopt all such internal regulations as may be requisite to maintain its own unity, its own nationality, its own supremacy (upon which alone rest the safety, prosperity and happiness of the citizen), against the unlawful combinations of its own subjects, leagued together in the traitorous design to overthrow and destroy it.

The distinction is so broad, and so patent to the common understanding, that any thing beyond its mere statement would seem hardly justifiable in an

elementary treatise, but for the extraordinary assumption of the noble lords in the British Parliament, and the unfortunate position assumed by the British government toward the United States resulting from that assumption.

It is greatly to be hoped that a more mature consideration, and, above all, the irresistible logic of events, may produce a conviction of the error into which the government of Great Britain has unhappily fallen, and effect a change in her avowed policy, not so much for the influence of such a change upon the conflict to which it is directed, as for the reasonable apprehension that such a precedent in the law of nations, may, in after times, be a fruitful source of public calamity to the nation by which it was adopted.[1]

[1] Scarcely had the foregoing passed through the press, when information was received indicating a decided change in the policy of Great Britain, by an alleged ministerial construction of the Queen's proclamation of neutrality, which would seem to strip it of all significance.

It is said that, notwithstanding the proclamation of neutrality, the ships of war and privateers commissioned by the several belligerents will not be permitted to carry their prizes into British ports. Should this intelligence prove to be correct, although it be not possible to regard it as other than an acknowledgment that the proclamation of *neutrality* was premature, and should not have been made at all, yet such a salutary change of policy would be so gratifying in itself, as effectually to disarm criticism upon the method adopted to effect it.

The rights of lawful belligerents to claim the shelter and asylum of neutral ports with their prizes, there to await a sentence of condemnation by a competent tribunal of the country of the captors, is an established right, "settled," as Lord Stowell says, "by the inveterate practice of Great Britain." This right was the only substantial effect of the proclamation of neutrality, which is, beyond dispute, a virtual recognition of the confederate insur-

In connection with this subject a question has arisen as to the power of the President of the United States, under the Constitution, to institute the blockade of the ports of the states which are in rebellion against the national government.

The power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water, is vested solely in the Congress of the nation, by the provisions of the 8th section of the 1st article of the Constitution.

That power, therefore, cannot be exercised by the President. But the institution of a blockade is not of itself a declaration of war. It is the exercise of

rectionists as lawful belligerents. The exercise of such a right would undoubtedly enable the insurrectionists to inflict a blow of terrible severity upon the mercantile marine of the nation. Shorn of this right, the letters of marque issued by the rebels become dead-letters; for, their own ports being effectually blockaded, and the treaty stipulations existing between the United States and the governments of France and Spain, of Mexico, Central America, and the South American republics, precluding the use of the ports of these nations as asylums for prizes, a death-blow is inflicted upon the piratical expeditions of the insurgents, denominated privateering.

Such expeditions are inspired only by the hope of gain, and will not be undertaken, when, in addition to the ordinary hazard of the enterprise, no visible means exist of converting the captured property as lawful prize, after captures shall have been made.

In the rapidly shifting current of events, the test of the sincerity of Great Britain in this complete but satisfactory receding from her policy as first proclaimed, may be imposed upon her even before the publication of this work.

It requires but little political foresight to enable one to predict with confidence that the existence of amicable relations between the great nations of the world is suspended upon the manifestations of sincerity in this behalf, which shall be exhibited by that government.

one of the rights *incident to a condition of war*, clearly defined and established in the law of nations.

The institution of a blockade of the ports of a foreign nation, by the direction of the President, prior to any legislative declaration of war, or to the actual existence of hostilities, might properly be regarded as tantamount to a declaration of war, and therefore an unlawful assumption of the functions of the legislature. But war may exist without any congressional declaration. Such indeed was the case with the war between the United States and Mexico. There was no legislative declaration of that war, but by an act of Congress, the *actual existence* of the war by virtue of Mexican hostilities against the United States, was set forth and promulgated. It was therefore decided by the Supreme Court of the United States, in questions growing out of the acts of the President during that war, that the actual existence of the war authorized the executive, by virtue of his position as commander-in-chief of the army and the navy, and without any legislative enactment or declaration whatever, to exercise all the belligerent rights recognized by the law of nations:—"to direct the movements of the naval and military forces," and "to employ them in such manner as he may deem most effectual, to harass and conquer and subdue the enemy."[1]

The institution of a blockade is a right much more exactly defined and recognized in the law of nations than those exercised by the President,

[1] *Fleming et al.* vs. *Page*, 9 How., 615; *Cross et al.* vs. *Harrison*, 16 How., 189.

and which were in question in the cases referred to.

It would seem therefore that the constitutional power of the President to institute the blockade of the southern ports (as by his proclamations of the 19th and 27th of April, 1861) is not only clear as resulting from his office of commander-in-chief of the naval forces, but it is established and has become *res adjudicata* by the decision of that tribunal whose province it is to interpret the constitution, provided it be conceded that war actually existed at the time of the institution of the blockade.

Of course it is matter of notoriety that hostilities of the most determined and most aggravated character were then actually being carried on by the insurrectionists against the United States. These acts of hostility and rebellion are recited in the proclamation of the President, and no one can doubt that they had reached that point which fully justified the declaration that civil war then existed. The proclamation of blockade, in its recital of the acts of hostility committed and threatened, must be considered as equivalent to a declaration of the existence of civil war.

The question then returns;—the institution of blockade, being the exercise of a right resulting from a condition of war which the President of the United States may constitutionally direct as commander-in-chief of the naval forces, without any legislative act—when war actually exists—is it competent for the President to determine that war does exist, and act accordingly?

This question also seems to have been definitively settled by the Supreme Court of the United States,

establishing the power of the President to declare the actual existence of a civil war, as well between a foreign nation and its revolting citizens or subjects, as with reference to a domestic insurrection. In the cases already referred to,[1] it was decided that it was the province of the executive to determine as a political question, whether civil war actually existed between Spain and her colonies, and the executive having thus declared, it was the duty of the judiciary to extend to both parties all the rights of lawful belligerents.

By the 8th section (15th clause) of the 1st article of the Constitution, the Congress of the United States is clothed with the power "*to provide* for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Pursuant to this power the Congress *has provided* for calling forth the militia, by a special act, which vests in the President of the United States an absolute discretion over the subject matter.[2]

The Supreme Court has decided that this legislative enactment, clothes the executive with the exclusive authority of deciding whether the emergency has arisen contemplated by the constutional provision, in other words to determine whether there is an invasion by a foreign power, which is a public war, or a domestic insurrection, which may be a civil war, to require or justify the calling forth the militia in defence of the national integrity.[3]

[1] *The Santissima Trinidad*, 7 Wheaton, 305.

[2] Act of 1795; ch. xxxvi., §§ 1, 2.

[3] *Martin* vs. *Mott*, 12 Wheat., 29; *vide* also, Story's Com. on the Const., §§ 1209, 1211.

This would seem to cover the entire ground.

The facts recited in the executive proclamation, by which the blockade is ordered, and 75,000 militia are called into service, are equivalent to a declaration of the existence of a civil war, waged for the avowed purpose of effecting the destruction of the government—not a mere insurrection incited to resist the execution of an obnoxious law.

This is a political question which it is the province of the executive to determine.

Having thus determined that a civil war exists, as commander-in-chief of the army and the navy, the President becomes forthwith vested with the power of exercising all the rights resulting from a condition of war, known to the law of nations, prominent among which is that of blockading the ports of the enemy.

The difficulty which at first seems to embarrass the solution of this question arises out of the apparent inconsistency between the position which the parent government necessarily assumes in the institution of a blockade of the ports of its rebellious subjects, which is the position of a belligerent power exercising a right incident only to a condition of war, whether it be a public or a civil war; and its position, by which it denies to the people in rebellion one of the principal belligerent rights, namely, that of annoying the enemy's commerce without being subjected to the penalties of the municipal law of piracy.

But in truth there is no such inconsistency. A sovereign nation, engaged in the duty of suppressing an insurrection of its citizens, may, with entire consistency, act in the twofold capacity of sover-

eign and belligerent, according to the several measures resorted to for the accomplishment of its purpose. By inflicting, through its agent the judiciary, the penalty which the law affixes to the capital crimes of treason and piracy, upon those who shall be found guilty of levying war against the nation, or of committing depredations upon its commerce, it acts in its capacity as a sovereign, and its courts are but enforcing its municipal regulations. By instituting a blockade of the ports of its rebellious subjects, and thereby interdicting their commercial intercourse with the world, and enforcing this measure by capturing its vessels and cargoes wheresoever found, and by capturing the vessels of all nations that shall violate or attempt to violate the blockade imposed, or shall supply or attempt to supply them with any means whatever to enable them to continue their rebellion, the nation is exercising the right of a belligerent, and its courts, in their adjudications upon the captures made in the enforcement of this measure, are organized as courts of prize, governed by and administering the law of nations. This position is very clearly stated by Chief-Justice Marshall. He says: "A sovereign who is endeavoring to reduce his revolted subjects to obedience, possesses both sovereign and belligerent rights, and is capable of acting in either character. If, as a legislator, he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law and the proceedings under it will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying the law to particular cases, acts as a

prize court or as a court enforcing municipal regulations."[1]

JUDICIAL CONSTRUCTION OF THE EXECUTIVE PROCLAMATION.

Under the early adjudications made in the Federal courts of New York and Massachusetts, during the existing war in the United States, upon captures made for violation of the blockade of the southern ports, an interesting and important question arose, as to the construction of the Executive proclamation, by virtue of which the blockade in question was set on foot.

It was contended, with great earnestness and ability, by many distinguished counsel, representing the interests of claimants of captured property, that, by the terms of the proclamation of the 19th of April, 1861, a neutral vessel, having knowledge of the blockade, was not liable to capture for an attempted violation, unless that attempt were made after the vessel had been once warned of the existence of the blockade by one of the blockading vessels stationed off the port, and such warning had been indorsed upon her register.

The language of the proclamation, relied upon to sustain this position, is as follows:

"If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave any of the said ports, she will be duly warned by one of the blockading vessels, who will indorse on her register the fact and date of such warning;

[1] *Rose* vs. *Himeley*, 4 Cranch, 272.

and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured, and sent to the nearest convenient port, for such proceedings against her and her cargo, as prize, as may be deemed advisable."

It is obvious, that upon the peculiar phraseology here adopted, an argument of much plausibility and force may be presented, in support of the position taken.

In the determination of the question whether such construction can be maintained, it is proper, first of all, to consider its effect, as accomplishing or defeating the purpose of interdicting commerce with the ports of the insurgent states, for which the blockade was established.

And here, it is quite apparent, that if neutral vessels, with full knowledge of the blockade, may, without incurring the hazard of capture, enter and depart from any of the blockaded ports, as often as they can succeed in evading a warning by the commander of a blockading vessel, and an indorsement of the warning upon her register, such immunity would operate an utter defeat of the purpose of the interdict.

It would be, in effect, a universal license to all neutral traders, whatever their knowledge of the inhibition, so long as they could succeed in avoiding the fatal warning and its indorsement, to do precisely that which it is the expressed purpose of the proclamation to prohibit, namely, to enter and depart from the interdicted ports, accomplishing the purposes of commerce, and supplying the enemy with the means of continuing and prolonging his revolt, without being subjected to any peualty therefor.

It would be as if the Executive had thus proclaimed:

"I intend to set on foot a blockade of the southern ports, which blockade shall interdict all approach of neutral vessels, after its establishment, and they have knowledge of it, because, if allowed to approach, under any pretence, they will be sure to avail of that pretence to secure an entrance, with immunity from capture if unsuccessful. *Nevertheless*, each neutral vessel of the world may once approach each one of these twenty or thirty blockaded ports, with full knowledge of the blockade—nay, with a view to violate it—and she shall be perfectly free from liability to capture, until after she shall have received a warning from the commander of one of the blockading vessels of the particular port she is attempting to enter, and such warning and its date, is indorsed on her register, and each vessel of every neutral nation is hereby expressly invited to violate the blockade of each one of these ports, and deliver a cargo tto he insurgent population, and purchase and carry away the produce of their country; and this she may do with entire impunity, as often as she can succeed in avoiding a warning from a naval commander off the port, and an indorsement on her register. If the vessel succeed in *getting in* without such warning, no offence shall be held to have been committed subjecting her to capture; and if the same vessel in *coming out*, laden with cotton or tobacco, should be so unfortunate as to receive such warning, she will be liable to capture only in the event that she shall again attempt to *leave* or enter the same port."

That such would be the character of the block-

ade, under the construction claimed, no one will deny. Nor will any one deny that such could never have been the Executive intention. But, argued the advocates of a literal construction of the language of the proclamation, the well-settled rules of law do not permit a court, in the interpretation of a statute or public instrument, to look beyond the words and language actually employed—to interpolate or import into the statute or instrument words which are not to be found there—or to seek for the intention elsewhere than in the very words which have been employed to convey it. It was urged that this rule, as established by the authorities, was thus faithfully expressed by Lord Denman (in the case of *Green* vs. *Wood*, 7 Q. B., 178): "We are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used; but if we find language used which is incapable of a meaning, we cannot supply one. It is extremely probable that the alteration suggested would express what the legislature meant, but we, looking at the word as judges, are no more justified to introduce that meaning, than we should be if we added any other provision."

This was appropriate to the case before the court; but here there is no language used which is incapable of a meaning, nor any occasion, in order to avoid the construction contended for, of supplying a meaning, not fairly deducible from all the language employed.

The rule is tersely and better expressed by Vattel, thus: "It is not allowable to interpret what has no need of interpretation." (Lib. 2, ch. 17, § 262.)

But better still by the Court of Appeals of New

York, in the case of *Newell* vs. *The People*, 3 Selden, 97: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses.* To ascertain this, the first resort in all cases is to the *natural signification* of the *words employed*, in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded, the words embody a definite meaning, which *involves no absurdity* and *no contradiction between different parts of the same writing*, then that meaning, apparent on the face of the instrument, is the one which *alone* we are at liberty to say was *intended to be conveyed.* In *such a case* there is *no room for construction.* That which the *words declare* is the *meaning* of the instrument; and neither courts nor legislatures have the right to *add to* or *take away from* that meaning."

And again, in the case of *McClusky* vs. *Cromwell*, 1 Kern., 601: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent *in every legitimate way.* But, in the construction both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, *in the words and language employed;* and, IF THE WORDS ARE FREE FROM AMBIGUITY AND DOUBT, and EXPRESS PLAINLY, CLEARLY, and DISTINCTLY the sense of the framers of the instrument, there is *no occasion to resort to other means of interpretation.* It is not allowable to interpret *what has no need of interpretation*, and when the words

have a definite and precise meaning, *to go elsewhere in search of conjecture*, in order to restrict or extend the meaning."

Thus it is perceived, where the words are not free from ambiguity and doubt, and do not express plainly, clearly, and distinctly, that which is known to be the sense of the framers of the instrument, there is occasion, and it is proper, to resort to other means of interpretation.

A proclamation which announces a belligerent blockade "pursuant to the law of nations," and then proceeds to exempt from capture vessels which shall attempt to violate it—having full knowledge of its existence—can hardly be said to be free from ambiguity. Indeed, it is not easy to perceive how an instrument could, in its terms, be more ambiguous, or more obviously require judicial interpretation, to give it any force or effect whatever.

The language required to be introduced into the proclamation, in order to free it from ambiguity and give it any salutary force, is this, "and without knowledge thereof," so that it shall read, "if, therefore, with a view to violate such blockade, and without knowledge thereof;" and this is not an interpolation of words expressing an idea not found in the instrument—because the proclamation expressly declares that the blockade is to be "pursuant to the law of nations," and without these words, the blockade would be repugnant to the law of nations, while with them it would be entirely consonant with that law, so that the words are really no interpolation whatever. They but express the manifest idea and intent of the proclamation when announcing a belligerent blockade.

But, it was further argued by the advocates of the claimant's construction of the proclamation, that the addition of the words "and without knowledge thereof," would annul the force of the immediately previous words, "if with a view to violate such blockade," upon the idea that a vessel could not have a view to violate a blockade without knowledge of it. And why not? If a vessel approach a blockaded port with the view to enter, she approaches with a view to violate the blockade, whether she knows of the blockade or not. It is the entry which is the violation, and the approach with a view to enter is an approach with a view to violation. A criminal violation, which is a violation with knowledge, is one thing. An innocent violation, which is a violation without knowledge, is another and very different thing.

The treaty of 1794, between the United States and Great Britain, contains the following stipulation:

"Whereas it frequently happens that vessels sail for a port or place belonging to an enemy, *without knowing that the same is blockaded*, it is agreed that every *such* vessel may be turned away from such port, but shall not be detained nor confiscated, unless after notice she shall again attempt to enter."

The neutral commerce of Great Britain, more than that of all other nations, was to be affected by the belligerent blockade about to be established; and it would almost seem as if the framer of the proclamation had this treaty before him, and inadvertently omitted the insertion of the italicized words.

The flag-officer of the Atlantic naval squadron of

the United States, in announcing, eleven days after the proclamation was issued, that the blockade ordered was effectively established, supplied the omitted words by declaring that "All vessels, passing the capes of Virginia, *coming from a distance, and ignorant of the proclamation*, will be warned off," &c.

Although immunity from capture was urged by claimants upon the literal construction of the Executive proclamation as here stated, in many adjudicated cases[1] the question seems to have been judicially determined, upon more full discussion, in the case of *The Empress*, decided in the Federal court of New York, and *The Revere*, decided by the Federal court of Massachusetts, and in the case of *The Admiral*, decided in the Federal court of Pennsylvania, and afterward on appeal by the Circuit Court of the United States for the Third Circuit.

The learned judge of the District Court of New York, in deciding the former of these cases, says: "But it is contended by the claimants, that there can be no actual or intended violation of the blockade by a neutral vessel, subjecting her to capture, whatever may be her knowledge of its existence, and whatever the moral turpitude of her acts, until after she has had official notice of the fact that the port visited is under blockade indorsed on her register; that the offence to which the penalty attaches can only be committed by an effort of the vessel to enter the port after such formal warning has been received by her.

[1] *Vide* the cases of *The Hiawatha*, *The Hallie Jackson*, *The Lynchburg*, *The Crenshaw*, *The Hannah M. Johnson*, *The General Green*. MS. Decisions U. S. Dist. Ct., N. Y.

"This argument is raised upon the terms used by the President, in his proclamation of April 19th, 1861, which are: "If, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured, &c.'"

The official announcement by the proclamation, is, that the President has deemed it advisable to set on foot a blockade of the ports of the states enumerated, "*in pursuance of the laws of the United States, and of the law of nations*," and Commodore Pendergrast on the 30th of the same month, gave public warning to all persons interested, that he had sufficient naval force to carry out the blockade, and that "vessels passing the capes of Virginia, *coming from a distance, and ignorant of the blockade*," will be warned, &c.

"The paramount fact announced by the proclamation, and the public warning by Commodore Pendergrast, was, that the blockade was laid in pursuance of the laws of the United States, and of the laws of nations. The law of nations is explicit and indubitable, that a neutral vessel, knowing a port to be in a state of blockade, and sailing toward it, with intent to evade such blockade, commits a fraud upon the belligerent rights of the blockading power, and is subject to forfeiture therefor (3 Phillimore's International Law, 397; Wheaton, Int. Law, 541, 550; 1 Kent, 148, 149; 1 Duer, on Ins., 663, § 39; Flander's Mar. Law, 168, § 225,

note 3; 2 Arnold's Mar. Ins.; 747 Perkins' ed.)." After a consideration of the question, how far, if at all, this rule of international law may have been modified, or relaxed by the latest authorities (which has been quoted from this able opinion, in another connection), the court proceeds:

"The question then remains, whether this vessel is exempt from that consequence, by the terms of the President's proclamation of April 19th, 1861.

"Previous to the capture herein, the Executive order of blockade was ratified by act of Congress (act of August 6th, 1861, § 3), and that ratification, independent of all adjudications by the courts on the subject, disposes of the objection still continued in these defences, as to the want of authority in the President to impose it, and the only question of moment resting on the case, is, as to the interpretation of its effect, under the laws of the United States, and the law of nations."

"The United States, as a neutral power, has never insisted with belligerent nations, that the public law, required, that a neutral vessel approaching a blockaded port, was, in all cases entitled to receive there notice of such blockade, and to be warned off, and be free from liability, for an approach to the port, unless attempted by the neutral after such warning."

"This matter has been made the subject of early treaty compacts with England in 1794 (8 Stat. at Large, 125, art. 18), with France in 1800 (8 Stat. at Large, 184, art. 12), and with various other commercial nations. By these treaties, the principle recognized by this country, as the accepted and governing principle of international law, is declared

to be, that a neutral vessel, visiting a blockaded port, *in ignorance of the blockade*, shall be entitled to be warned off, and not liable to arrest, unless she again approaches the blockaded port, with intent to enter it. The Supreme Court of the United States regards these treaty compacts as the true exposition of the law of nations in respect to blockades. (*Fitzgibbons* vs. *Newport Ins. Co.*, 4 Cranch, 199.)

"This subject has been amply discussed in the jurisprudence of the United States in all its bearings, and must be regarded as familiar to the government and the publicists of the country when the proclamation of April 19th was published.

"The emphatic doctrine announced in the adjudications of the courts of this country, and set forth in the dispatches of learned jurists, is, that a neutral vessel, going voluntarily to a blockaded port, knowing of the blockade, with design to enter the port, and with whatever pretence of inquiry or communication thereat, is guilty of a fraud upon the belligerent rights of the blockading party, and is liable to condemnation therefor. (Cases before cited, 5 Cranch, 335; 6 Cranch, 29; 1 Duer, 691, notes; note to 3 Wheat., 196.)

"In view of the state of the law and its administration, in regard to visitation of blockaded ports by neutral vessels, I think the proclamation of April 19th, 1861, must be understood to refer to, and embrace only, those vessels approaching the port *in ignorance* of its being under blockade. If the fact of its being blockaded is known to the vessel when the voyage is undertaken, it is unlawful for her to enter within the limits of the blockade to seek information as to its continuance; and immunity

from capture for such act, cannot be predicated upon the terms of the Executive proclamation."

The case of *The Revere*, adjudicated in the United States District Court of Massachusetts, presented the same question; and it is thus considered by the learned judge presiding in that district:

"The second ground of defence relied upon is, that this vessel had no warning indorsed upon her register, as set forth in the President's proclamation of the 19th of April."

"It is contended that, under the proclamation, *The Revere*, with information of the existence of the blockade, had a right to sail from Halifax direct to this port (Beaufort), knowing of the blockade, and to enter it, if not there warned off, and the warning indorsed on her register by a ship of war, in the manner set forth in the proclamation; and that, until such warning, she was not liable to capture for an attempt to enter."

"In support of this proposition, an argument of much force has been presented, from the language of the proclamation and the decision of the Supreme Court in the case of the *Maryland Ins. Co.* vs. *Woods*, 6 Cranch, 29, and other authorities, cited by the counsel for the claimants. On the other hand, it is contended, that by the true construction of the proclamation, only those who are ignorant of the blockade are entitled to a warning and indorsement; and that it is not to be presumed that a belligerent would gratuitously narrow his own rights to his own injury; that by the *Law of Nations* this vessel had such information and notice as to preclude her from the right to inquire at the port and attempt to enter.

"This view is strengthened by the earlier part of the proclamation, which declares that a blockade is set on foot, *in pursuance of the law of nations.*

"The notice given to the world by Commodore Pendegrast, evidently gives to the proclamation, the construction contended for by the captors.

"After referring to the proclamation, and stating that he had sufficient force for carrying it into effect, he says: 'All vessels passing the capes of Virginia, coming from a distance, and ignorant of the proclamation, will be warned off.'

"The world thus had notice, that those only were to be warned who were ignorant.

"This question of a necessity of a warning and indorsement, came before the eminent admiralty judge in the southern district of New York, in the case of *The Hiawatha*, which had left the port of Richmond, and he held, that previous knowledge of the blockade, dispensed with the necessity of warning.

"In the case of the brig *Hallie Jackson*, which was attempting to enter a blockaded port, the same learned judge held that she was not entitled to be warned off, 'if approaching with intent to violate the blockade.'"

The learned judge, after thus clearly manifesting his opinion as to the true construction of the Executive proclamation, proceeds to declare his views, that even though the literal construction of that instrument were required, under the rules of interpretation, the immunity claimed by such construction, could only be set up and availed of, by neutral vessels, whose acts had been characterized by fairness, good faith, and honesty.

This position, although it would substitute a conditional immunity for that absolute immunity which the words of the proclamation would seem to import, is nevertheless not without support, in view of the uniform decisions of prize courts, inflicting the penalty of confiscation upon vessels convicted of deceptive practices upon belligerent rights, by simulated papers presenting a false destination, by mutilation of documents, by clandestine approach, and by false pretences of stress of weather, want of provisions, and the like, as an excuse for the attempt to enter an interdicted port, and even declining to allow further proof of the innocence and neutral character of the shipper and owner of cargo, captured on board such vessel.

If this position be well taken, then the question of construction of the proclamation of blockade becomes of inferior interest and consequence, inasmuch as by far the greater portion, if not all the cases of capture, under its provisions, have developed convincing proofs against the vessels, of dishonest and fraudulent practices, in some of the particulars, for which the penalty of confiscation is decreed by the authoritative decisions.

The subject of the right of a neutral vessel, in time of war, having previous knowledge of the existence of a belligerent blockade, to proceed upon a voyage direct to the port blockaded, with instructions, and the design, in fact, to inquire at the port itself, whether the blockade is still in force, was very ably discussed by the learned judge of the Circuit Court of the United States for the Third Circuit, in the case of *The Admiral*, on appeal be-

fore him from a final decree of condemnation rendered by the District Court of the United States for the Eastern District of Pennsylvania.

His conclusions, as will be seen, are in accordance with the well-settled doctrine of the English prize courts, and with the recent decisions of the several District Courts of the United States.

The learned judge says:

Opinion of Mr. Justice Grier.

"I agree with C. J. Tindal, in *Medeiros* vs. *Hill*, 8 Bing., 231, that the mere act of sailing to a port which is blockaded at the time the voyage commenced, is not an offence against the law of nations, where there is no premeditated intention of breaking the blockade.

"Consequently, if, in the present case, *The Admiral* had taken out a clearance for Savannah, with the expectation that the blockade might be removed before her arrival, with instructions to make inquiry as to its continuance, *at New York or Halifax*, or other *neutral port*, and, after having made such inquiry, had made no further endeavor to approach or enter the blockaded port, her seizure and condemnation as prize could not have been justified.

"But this presents a very different case. She was off Tybee Island, sailing for the blockaded port. She had made no inquiry on the way, had no reason to believe the blockade to be raised, and when arrested on her attempt to enter, she exhibits a clearance for St. Johns, New Brunswick (a port she may be said to have passed), and a letter of instruction from her owners, 'to call off the harbor of Savannah to endeavor to meet the blockading ship, and get the officer in command to indorse the register, &c., but to make no attempt to run the blockade.'

"The clearance is the proper document to exhibit and disclose the intention of the ship. The clearance, in this case, may not properly come within the category of 'simulated papers,' but it does not disclose the whole truth.

"The suppression of a most important part, makes the whole false.

"It may be true that in times of general peace, a clearance exhibiting the ultimate destination of the vessel, without disclosing an alternative one, may have sometimes been used by merchants to subserve some private purpose.

"But in times of war, when such omissions may be used to blindfold belligerents as to the true nature of the ship's intended voyage, and to elude a blockade, the concealment of the truth must be considered as *primâ facie* evidence of fraudulent intention.

"*The Admiral*, with full knowledge that her destined port is blockaded, takes a clearance for St. Johns, and is found a thousand miles from the proper course to such a port, and in the act of entering the blockaded port, and when thus arrested, for the first time, inquires if such blockade is raised.

"A vessel which has full knowledge of the existence of a blockade before she enters on her voyage, has no right to claim a warning or indorsement, when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade, and got their first intimation of it from the blockading vessels.

"Now, the primary destination of this vessel is to a blockaded port. If the owners had reason to expect that possibly the blockade might be raised before the arrival of their vessel, and thus a profit be made by their ability to take the first advantage of it, then the clearance, in the exercise of good faith, should have made admission of the true primary destination of the vessel. If the truth had appeared on the face of this document, and *if the master had been instructed to inquire at some intermediate port*, and to proceed no further in case he found the blockade still to exist, the owners might justly claim that their conduct showed 'no premeditated intention to violate the blockade.'

"But when arrested in the attempt to enter a port known to be blockaded, with a false clearance, it is too late to produce the bill of lading, or letter of instructions, to prove innocency of intention.

"In such cases, intentions can be judged only by acts.

"The true construction of this proceeding, may be thus translated:

"Enter the blockaded port, if you can, without danger. If you are arrested by a blockading vessel, inform the captain that you were not instructed to run the blockade, but had merely called for information, and would be pleased to have your register indorsed, with leave to proceed elsewhere.

"If so transparent a contrivance could be received as evidence of a want of any 'premeditated intention to violate the blockade,' the important right of blockade would be a *brutum fulmen*, in the hands of a belligerent.

"'It would,' says Lord Stowell, 'amount in prac-

tice to a universal license to attempt to enter, and being prevented, to claim the liberty of going elsewhere.'

"In the cases where the stringency of the general rule established by this judge (but overruled in *Madieros* vs. *Hill*) has been relaxed as to American vessels in certain circumstances, the clearances were taken contingently, but directly for the blockaded port, in the expectation of a relaxation of the blockade, with instructions to inquire as to the fact *at a British or neutral port.* The clearance exhibits the whole truth, and the place of inquiry, their good faith.

"In these most material facts, this case differs from them."

With scarcely an exception, the British vessels which have been captured, for an attempted or intended violation of the belligerent rights of the United States, during the existing war, have been furnished with documents, of a similar deceptive character, to those found on board the *Admiral.*

The neutral traders of Great Britain have been permitted to make use of the port of Nassau, as the port of clearance and departure of their vessels innumerable, laden with arms, munitions of war, and supplies for the insurgents in the southern states.

If these vessels have been destined for a gulf port blockaded, their papers, concealing that fact, represent the port of destination to be Matamoras or Tampico. If the design has been to violate the blockade of an Atlantic port, the vessel was documented for St. John's or Halifax.

The ingenuity of these traders by no means equals their cupidity—and therefore, in every case of cap-

ture, the fraud, in some manner, has become quite transparent.

Contraband commerce prohibited to neutral nations.

The next exception to the general right of neutral nations to pursue their accustomed commerce, in time of war, is that which prohibits their commerce with the enemy in such articles as are denominated contraband.

What commerce shall be deemed contraband, between the forces of belligerent states and the merchants of neutral nations, has occasioned infinite discussion, and the rule has been subjected to frequent fluctuations, in accordance with the prevalence of the policy of the rigor of war or the freedom of commerce. The early elementary writers upon this subject distinguish between articles which are useful only as serving the purposes of war, such as arms and ammunition; such articles as serve the purposes of pleasure simply, and such as are of a mixed nature, that is to say, useful both in war and in peace. As to articles of the third description, the great, and perhaps the only difficulty arises; for whether they should be regarded as contraband or not, depends entirely upon the circumstances existing at the time.[2]

What are contraband commodities.

"The catalogue of contrabands has varied very much, and in such a manner," says Lord Stowell, "as to make it very difficult to assign the causes for the variations; owing to peculiar circumstances the reason of which has not accompanied the history of the decisions."[3] It is universally conceded that

[1] *Rose* vs. *Himeley*, 4 Cranch, 272. [2] Grotius, Book III., c. i., § 5.
[3] *The Jonge Margaretha*, 1 Rob., 189.

commodities particularly useful in war, such as arms, ammunition, horses and their equipments, timber and materials for ship-building, and naval stores of all kinds, are contraband.[1]

Question as to provisions.

The greatest difficulty seems to have arisen in the article of provisions. On occasions when the expectation has been to accomplish the purposes of war by reducing the enemy to famine, provisions have been held to be contraband. At other times, the criterion adopted by the courts, in determining whether the article of provisions is or is not contraband, has been, whether upon examination it is found to be in a crude condition, or whether it be in a condition of preparation for immediate consumption. On the same principle, unwrought iron has been regarded with more indulgence than iron fabricated for use, as anchors, &c.

Thus, too, hemp has been regarded as an allowable article of merchandise, while cordage is contraband; and wheat has been held to be a lawful article of trade, while biscuit, or any of the final preparations of it for human use, are held to be unlawful.[2]

The rigid rule of law, and its modern relaxations as to provisions, are explained by Lord Stowell in a case in which the question was directly before the court.[3] "The right," he says, "of taking possession of cargoes of this description, going to an

[1] Vattel, Book III., c. vii., § 112.

[2] *The Jonge Margaretha*, 1 Rob., 189.

[3] *The Haabet*, 2 Rob., 182; *vide* also, *The Jonge Hermanas*, 4 Rob., 95; *The Gute Gesellschaft*, 4 Rob., 94; *The Charlotte Fox*, 5 Rob., 275; *The Twee Juffrowen*, 4 Rob., 158; *The Jonge Tobias*, 1 Rob., 329; *The Mana*, 1 Rob., 340; *The Zacheman*, 5 Rob., 152.

enemy's ports, is no peculiar claim of this country, it belongs generally to belligerent nations. The ancient practice of Europe, or of several maritime states of Europe, was to confiscate them entirely. A century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to the right of pre-emption— that is, to a right to purchase, upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood, that on the side of the belligerents, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for his commodities; if they get there, it does not follow that, acting upon my rights of war in intercepting such supplies, I am under obligation of paying that price of distress."

As to provisions the right of pre-emption substituted for confiscation in certain cases.

In strictness, according to the current of authority of the courts, all provisions are contraband. In this rude condition, however, the right of confiscation is waived for the more lenient one of pre-emption; but the rigid rule of confiscation is applied when the provision has been manufactured into a condition for immediate use.[1]

[1] *Vide* diplomatic correspondence between Mr. Hammond on the part of England, and Mr. Jefferson and Mr. Randolph on the part of the United States, Sept. 12, 1793, and April 12, 1794; and Mr. Pickering and Mr. Monroe, Sept. 12, 1795. *The Com-*

Destined use, a national question.

In the determination of the question of contraband, there is no circumstance of so much importance as that of the destination of the cargo in question.

"The most important distinction," says Lord Stowell, in a case already cited, "is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use, or whether they were going with a very highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles are going, is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally, a frigate or other ship of war may be constructed in that port. On the contrary, if the great predominant character of the port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for, it being impossible to determine the final application of an article, *ancipitis usûs*, it is not an injurious rule which deduces, both ways, the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a

mercen, 2 Gall., 269, and 1 Wheat., 382; *The Jonge Andrews*, 1747; *The Zelden Rust*, 6 Rob., 93; *The Ranger*, 6 Rob., 125; *The Edward*, 4 Rob., 68.

supply of those articles would be eminently useful."[1]

The relaxation of the rule of confiscation of articles which are decidedly contraband in their character, for that of pre-emption, is applied to cases where the article in question (as naval stores) is the product of the claimant's own country; for it is considered that confiscation would be a harsh exercise of a belligerent's right, to prohibit a material branch of the neutral's natural trade.[2]

With the exception, however, of these cases of relaxation, substituting pre-emption for confiscation, when the merchandise is clearly proved to be contraband, confiscation to the captor ensues as of course. The simple detention of such articles would be an ineffectual method of redress; for it is essential that the apprehension of loss should operate as a check to the avidity of gain, and thus deter neutral merchants from all attempts to supply the enemy with such commodities. It is this necessity, resulting from a proper regard for the nation's welfare and security, which induces the declaration that all such merchandise, destined for the enemy's country, shall be considered lawful prize. "On this account," says Vattel,[3] "she notifies to neutral

[1] *The Jonge Margaretha*, 1 Rob., 194; *vide* also, *The Nostra Senora de Begona*, 5 Rob., 99; *The Neptunus*, 3 Rob., 108; *The Richmond*, 5 Rob., 325; *The Brutus*, 5 Rob., app. 1; *The Jonge Jan*, 1 Dod., 458; *The Endraught*, 1 Rob., 23; *The Elonora Wilhelmina*, 6 Rob., 331; *The Charlotte*, 5 Rob., 305; *The Mende Brodee*, 4 Rob., 33; *The Friendship*, 6 Rob., 420.

[2] *The Sarah Christina*, 1 Rob., 237; *The Ringande Jacob*, 1 Rob., 90; *The Apollo*, 4 Rob., 158; *The Evart Evarts*, 4 Rob., 354.

[3] Vattel, Book III., c. vii., § 113.

nations her declaration of war, whereupon the latter usually give orders to their subjects, declaring that if they are captured in carrying on such a trade, the sovereign will not protect them.

"This rule is the point where the general custom of Europe seems fixed, after a number of variations; and, in order to avoid perpetual subjects of complaint and rupture, it has, in perfect conformity to sound principles, been agreed that the belligerent powers may seize and confiscate all contraband goods which neutrals shall attempt to carry to their enemy, without any complaint from the sovereign of those merchants, as, on the other hand, the power at war does not impute to the neutral sovereigns these practices of their subjects."

Where innocent goods are mixed with contraband the rule of confiscation applies to all.

Upon the subject of contraband, it has become a maxim, metaphorically expressed, that prohibited articles are of an infectious nature, and contaminate the whole cargo. The innocence, therefore, of any particular article, if mixed with such as are unlawful, will not protect it from confiscation.[1]

If a neutral would avoid the hazard of seizure, he must exercise circumspection during his entire voyage.[2] Should he touch at an enemy's port with contraband articles on board, though it be avowedly for the purpose of disposing of innocent articles, the whole property becomes liable to seizure and confiscation.[3]

Hostile dispatches contraband, subjecting vessel to confiscation,

The conveyance of hostile dispatches is included in the list of contraband, and deemed a practice of a character so noxious, as justly to subject the ship

[1] *The Stuadt Emdon*, 1 Rob., 26.

[2] *The Margaret*, 1 Acton, 335.

[3] *The Trende Sostre*, 6 Rob., 390, note.

to confiscation, and also the cargo, if the proprietor of the ship is at the same time the owner of the cargo. This principle has become firmly established in a series of cases in the British admiralty, as well as by the Lords, after the most elaborate and learned discussion.[1]

and cargo, if owned by owner of the ship.

By the ancient law of Europe, contraband cargo rendered the ship as well as cargo liable to condemnation. "Nor can it be said," says Lord Stowell, "that such a penalty is unjust, or not supported by the general analogies of the law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of courts of admiralty in this country, and I believe of other nations also, a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances."[2]

Confiscation of ship as well as cargo the ancient law for dealing in contraband with the enemy; relaxation of modern practice.

In the diplomatic correspondence between the United States and Great Britain, preliminary to the treaty of 1794, on the subject of contraband of war, the principal difficulty arose in relation to the article of provisions; on the part of England by

Treaty provisions on the subject of contraband of war between Great Britain and the United States.

[1] *The Atlanta*, 6 Rob., 440; *The Constitution*, Lords, July 14, 1802; *The Sally Griffiths*, Lords, Dec. 12, 1795; *The Hope*, Lords, April 23, 1803; *The Trende Sostre*, Lords, August 5, 1807; *The Lisette*, Lords, May 5, 1807; *The Constantia*, Lords, March 15, 1808; *The Susan*, Lords, April 1, 1808; *The Carolina*; 6 Rob., 464; *The Madison*, Edwards, 224; *The Rapid*, Edwards, 228; *The Drummond*, 1 Dod., 103.

[2] *The Ringande Jacob*, 1 Rob., 89; *The Jonge Tobias*, 1 Rob., 330; *vide* also Note to *The Franklin*, 3 Rob., 221.

Mr. Hammond, it being insisted that by the law of nations all provisions were to be considered as contraband, in the case where depriving the enemy was one of the means employed to reduce him to reasonable terms of peace. This position was strenuously resisted on the part of the United States, through Mr. Randolph, Mr. Jefferson, and Mr. Pinckney, contending that corn, flour, and meal, being the produce of the soil and labor of the country, were not contraband, unless carried to a place actually invested. Upon this question no other agreement was attained than that provisions were not generally contraband, but might become so, according to the existing law of nations in certain cases, and those cases were not defined, leaving to each party that construction of the law of nations which it had assumed.

As to other articles of merchandise, the treaty provides, that "all arms and ammunition and implements serving the purpose of war, all materials serving directly for the building and equipment of vessels, with the exception of unwrought iron, and fir-plank, tar and rosin, copper in sheets, sails, hemp, cordage, etc.," shall be considered contraband of war. The treaty, so far as its provisions relate to this subject, has always been regarded as merely declaratory of the conceded law of nations, and introducing no stipulation which would not have been, by that law, binding upon the parties without the treaty.

The right of visitation and search a belligerent right established in

The third and only remaining exception to the general rule, which accords to neutrals the unmolested pursuit of their accustomed commerce, is that

resulting from the rights of belligerents to enforce the previous exception, which prohibits their commerce in contraband commodities, and that is, the right of visitation and search. the law of nations.

This general right of belligerents has uniformly been upheld by all writers of authority in the law of nations. It has always been regarded as a sort of necessary incident to the right of prohibiting contraband trade, which right would be almost nugatory, but for the incidental right of ascertaining the existence of the contraband trade by a visitation and search of the neutral vessel.

Bynkershoek,[1] Valin,[2] Vattel,[3] De Martens,[4] all agree in according the right to belligerents, upon the ground that the conveyance of contraband goods by neutrals cannot be prevented without visiting and searching neutral vessels, and that a resistance to the exercise of the right subjects the resisting neutral to the penalty of confiscation.

Confiscation the penalty of resistance to the right of search.

Lord Stowell says, in the great leading case, in which the doctrine is discussed at length, and in a judgment which of itself is sufficient to place the learned judge in the highest position as an authority in the law of nations: "I stand with confidence upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search on

[1] Bynkershoek, Qu. Jur. Pub., Lib. I., c. xiv.
[2] Valin, Ord. de la Ma., Liv. III., Tit. 9, Art. 12.
[3] Vattel, Droit des Gens, Liv. III., c. vii., § 114.
[4] De Marten's, Precis., Lib. VIII., c. vii., § 321.

the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of a confiscation."[1]

Chancellor Kent says: "The duty of self-preservation gives to belligerent nations this right, and the doctrine of the English admiralty on the right of visitation and search, and on the limitation of the right, has been recognized in its fullest extent by the courts of justice in this country."[2]

Applies to merchant vessels only.

The right of search is strictly a war right, and does not exist, except by treaty stipulation, in time of peace.[3] It is a right which is confined to private merchant vessels, and does not apply to public ships of war. The immunity of public ships and vessels of war from the exercise of any jurisdiction, other than that of the sovereign power to which they belong, has been uniformly asserted and conceded.[4]

How exercised.

The right of visitation and search must be conducted with as much regard to the safety of the vessel detained as is consistent with a thorough examination of the character of the vessel.

If the neutral has acted with candor and good faith, and the inquiry has been wrongfully pursued, the belligerent cruiser is responsible to the neutral in costs and damages.[5]

In the exercise of the right, the cruiser may resort to stratagem, as by assuming the disguise of a friend

[1] *The Maria*, 1 Rob., 368. [2] Kent's Com., I., 153 *et seq.*

[3] *Le Louis*, 2 Dob., 248; *The Antelope*, 10 Wheat., 119.

[4] *The Prins Frederick*, 2 Dod., 451; *The Exchange* vs. *McFadden*, 7 Cranch., 116; *L'Invincible*, 1 Wheat., 238.

[5] *The Anna Maria*, 2 Wheat., 327; 2 Mason, 439.

or enemy; and if, in consequence of such stratagem, the crew of the detained vessel abandon their duty without being made prisoners of war, and the vessel is thereby lost, the captors are not liable.[1]

Treaty provisions.

The right of visitation and search has been constantly recognized by treaties between maritime nations, and stipulations are introduced specifying the manner in which the right shall be exercised. It is usually provided that the searching vessel shall remain not nearer than cannon-shot distance from the ship visited, and shall send a boat with not more than two sitters, beside the rowers, which two persons shall inspect the ship's papers, of which the form is usually fixed by the treaty. If these papers are found regular, and affording no reason for detention, the ship is to be allowed to proceed. If, however, there are circumstances which are regarded as suspicious, it is provided that the ship may be brought in further inquiry, subject to a claim for costs, expenses, and damages, if the detention shall have been capricious or unreasonable. Treaties, embracing substantially these provisions, were made between France and the United States in 1778; between the United States and the States-General in 1782; between the United States and Sweden in 1783.

Ships' papers proper to be examined.

In the exercise of the right of visitation and search upon a neutral vessel, the first object of inquiry is, generally, the ship's papers. These are:

1. The passport, being the letter of license from the neutral power to proceed on the voyage. This

[1] *The Eleanor*, 2 Wheat., 345; *The George*, 1 Mason, 24.

pass, to be regular, must be specific and not general, and describe explicitly the true parties.[1]

2. The sea-letter or brief, specifying the nature and quantity of cargo, the place of lading, and place of destination.

3. The documentary proof of property.

4. The muster-roll of the ship's company, which should set forth not only the names, but ages, condition, place of residence, and birth of each.

5. The charter party, if any, which may serve to authenticate the facts connected with the proof of neutrality.

6. The bills of lading, showing the nature of the obligation between the master or owner and shipper.

7. The invoices or manifest, showing the particulars of the cargo, by whom shipped, and to whom consigned.

8. The log-book, being the journal of the ship's voyage, and of each day's progress and occurrences.

9. The bill of health, being a certificate that no contagious disease prevailed at the place of departure of the ship, and that none of the crew were infected with such distemper; and

10. The letter of instructions to the master, with which, especially in times of war, a neutral master should always be provided. These instructions should always be produced. The withholding them has been held a just cause of suspicion, authorizing detention.[2] These letters of instruction, or the other papers, should always show the alternative destination of a ship, so as to establish the fact that

[1] *The Hoop*, 1 Rob., 129; *The Elizabeth*, 5 Rob., 4.

[2] *The Concordia*, 1 Rob., 120.

such alternate destination be fair and not fraudulent.[1]

All the papers should be produced. If any are kept back, it furnishes just ground of suspicion, and authorizes detention.[2]

The production of false papers has always been held a just cause of suspicion, justifying seizure, although under some peculiar circumstances it has been held not to be such conclusive proof as warrants condemnation, if the circumstances are clearly explained.

The spoliation of papers has been considered a circumstance of a much more aggravated nature, which may exclude proof, and be sufficient of itself to establish guilt. But in the courts, both of England and the United States, the spoliation of papers has not been regarded, as in other maritime countries, as sufficient to create an absolute presumption, *juris et de jure*, and they have allowed proof that such spoliation was the result of accident, of necessity or of superior force.[3] But such explanatory proof, to repel the presumption, must be prompt and frank, without prevarication or any evidence of bad faith.[4]

The right of search of merchant vessels sailing under convoy.

The question whether the right of search could be exercised by belligerents upon neutrals sailing under convoy, underwent much discussion about a century since. In 1762 it was contended by the

[1] *The Juffrau Anna*, 1 Rob., 120; *The Eenrom*, 1 Rob., 6; *The Odin*, 1 Rob., 122; *The Vigilantia*, 1 Rob., 1.

[2] *The Calypso*, 2 Rob., 158.

[3] *The Pizarro*, 2 Wheat., 227.

[4] *The Two Brothers*, 1 Rob., 133; *vide Bernardi* vs. *Motteaux*, Doug., 581; *The Adriana*, 1 Rob., 317.

Dutch government, that merchant vessels sailing under convoy were exempted from search. After much altercation it resulted in a treaty stipulation, recognizing the exemption. Such treaty stipulations have been entered into from time to time between several maritime nations;—between Sweden and the United States in 1783, between the United States and Prussia in 1785, between the United States and Morocco in 1787, and between the United States and France in 1800. Indeed, at the close of the last century, the doctrine of exemption of merchant vessels sailing under convoy, was recognized by all the principal maritime nations, with the exception of Spain and Great Britain.

In 1787 an attempt was made by a Swedish claimant to enforce the exemption in the British courts of admiralty, in a case in which a capture was made of a fleet of Swedish merchantmen, sailing under convoy, by a British squadron in the English channel, under command of Commodore Lawford, for a resistance to search. This was the case, before alluded to, in which Lord Stowell, so elaborately and with such masterly ability and learning, discusses the entire doctrine of the belligerent right of search. Upon this point he says, as a conclusion: "With regard to the question of convoy, the authority of a sovereign of a neutral country, being interposed in any manner of mere force, cannot legally vary the right of a lawfully commissioned belligerent cruiser. Two sovereigns may unquestionably agree, as they have agreed, in some late instances, that the presence of one of their armed ships along with merchant ships, shall be mutually understood to imply that nothing is to be

found in that convoy of merchant ships, inconsistent with amity and neutrality, and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge, which they agree mutually to accept. *But surely, no sovereign can legally compel the acceptance of such a security, by mere force.* The only security known to the law of nations, upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have an interest in making it."

In the spring of 1800, a collision on the same subject, took place between Great Britain and Denmark.[1] A Danish frigate convoying merchantmen resisted the search of a British frigate near Gibraltar, and the Danes having fired upon the boats sent to effect the search, reparation was demanded of the Danish government by the British minister at Copenhagen. A long and interesting diplomatic correspondence resulted between the two governments, pending which, or directly upon its expiration, another cause of complaint occurred between the same governments upon the same subject, by a resistance to search by Danish merchantmen under convoy, which resulted in a short engagement, and a surrender of the Dane to the British squadron as prize of war. Negotiations again ensued between the two governments. Terms of settlement of the immediate occasion of the difficulties were agreed upon, without any stipulation upon the question of the belligerent right of search of merchant vessels

[1] *The Maria*, 1 Rob., 340, 378.

under convoy, referring that to ulterior discussion; but before the convention was signed, the emperor of Russia succeeded in securing the agreement of the governments of Prussia, Sweden and Denmark, to unite with Russia in an armed neutrality against Great Britain, and in August, 1800, an embargo, without notice, in violation of the treaty between Russia and Great Britain of 1766, was laid by Russia on British property in Russian ports. After much intermediate correspondence, resulting in no measures of pacification, on the 14th of January, 1801, the British government laid an embargo on Russian, Danish and Prussian vessels in her ports. To this succeeded various measures, more or less hostile in their character, between the contending parties, culminating in the battle of Copenhagen on the 2d of April, 1801, which laid the Danish capital at the mercy of Great Britain. An armistice succeeded, during which it was agreed that the connection of Denmark with the armed neutrality should be suspended. Paul, the emperor of Russia died about the same time, and being succeeded by Alexander, friendly negotiations were immediately entered into with Great Britain, in which the principle of "free ships, free goods," theretofore claimed by Russia, was abandoned, and the principle that the presence of ships of war as a convoy, should protect neutral merchants from search, was recognized by Great Britain. A treaty with these stipulations was concluded, and acceded to by Sweden on the 30th of March, and by Denmark on the 23d of October, 1802.

A resistance to the right of search by a *neutral*, as we have seen, subjects both vessel and cargo to

confiscation; but a resistance to search by an enemy does not entail the penalty of confiscation upon neutral cargo on board the vessel, because such a resistance violates no belligerent duty on the part of the master, who is justified in escaping if he can.[1]

In 1810 the Danish government passed an ordinance, by which they declared subject to condemnation, "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain, as with the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy."

Several American vessels, sailing under British convoy, were captured for violation of this ordinance, and, together with the cargoes, were condemned. An interesting correspondence ensued between Denmark and the United States, for a detailed statement of which, the student is referred to the valuable treatise of Dr. Wheaton.[2] The difficulty was settled by a payment of a sum by Denmark, accepted as sufficient to liquidate American claims, but no decision was agreed to upon the question of the right claimed by Denmark, it being stipulated that the settlement should not be invoked as a precedent by either party.

The right of searching neutral *merchant* vessels for the purpose of ascertaining if any persons owing allegiance as subjects or citizens to the nation of the searching vessel are employed on board, has been made the subject of angry discussion and national conflicts.

The right of searching ships of war.

[1] *The Catherina Elizabeth*, 5 Rob., 232.

[2] Wheaton's Elements of International Law, II., 260, 278.

Great Britain has heretofore demanded that the right, for this purpose, should apply indiscriminately to all vessels. This right was resisted by Holland in 1653, and although that nation was beaten by the English in the hostilities ensuing, yet she never submitted to this claim by Great Britain in the terms of any subsequent pacification.

This claim, too, on the part of Great Britain, gave rise to a serious collision between that country and the United States, early in the present century, which resulted in open hostilities in 1812, the occasion and the history of which are familiar to the intelligent reader.

Upon the return of peace, the treaty which was entered into at Ghent, did not include a settlement of this question. At a subsequent period, in 1818, negotiations upon the subject were resumed, and the question, not only of impressment, but of blockade, contraband, trade with the colonies of a belligerent, prize courts, letters of marque, and all the great questions involving the great interests of commerce in time of war, were elaborately discussed, for the purpose of being defined and settled by conventional stipulations.

By the 4th article of the proposed treaty Great Britain was to surrender all claim of right to impressment on the high seas, and it was agreed between the negotiators that formal lists of American and British seamen should be made, and that they should determine the rights of nationality in any disputed case. But on the part of Great Britain it was *desired* that all seamen who were to be considered citizens of the United States should be naturalized before the *signature* of the treaty; while on

the part of the United States, it was *desired* that the limitation should extend to the *ratification* of the treaty, and upon this trivial difference the negotiations of 1818 terminated.[1]

In the discussions between the United States and Great Britain, in 1842, growing out of the differences relative to the north-eastern boundary of the United States, dividing the state of Maine from the British possessions, and which resulted in the Ashburton treaty, Mr. Webster on the part of the United States government, declared, that the rule as to the right of search, hereafter to be insisted upon, would be, "that every regularly documented American merchant vessel, would be evidence that the seamen on board were American, and would find their protection in the flag that was over them."

Right of search in aid of the suppression of the slave-trade.

Although the right of search is obviously and essentially a belligerent right, there being no power whatever in government vessels to search merchantmen in time of peace, yet such a power or privilege, like any other, may be mutually conceded, by treaty between nations. We accordingly find that such privilege has been in this manner accorded and established in the single case of searching vessels navigating in certain latitudes to ascertain if they have any slaves on board.

Treaty stipulations to this effect were entered into between Great Britain and Portugal in July,

[1] *Vide* Mr. Rush's Narrative of a Residence at the Court of London, p. 376.

1817; between Great Britain and Spain in September, 1817; between Great Britain and the Netherlands in May, 1818; and between Great Britain and Sweden in 1824.

By such mutual concessions, national pride and national jealousy were alike sacrificed in the great cause of humanity; and this, on the part of Great Britain especially, was indeed, no inconsiderable sacrifice—fully justifying the noble sentiments expressed upon the occasion by Sir James Mackintosh:

"For myself, I feel a pride in the British flag being, for this object alone, subjected to search by foreign ships. It has now risen to loftier honor by bending to the cause of justice and humanity. That which has braved the mighty, now lowers itself to the feeble and defenceless, to those, who, far from being able to make us any return, will never hear of what we have done for them, and are probably ignorant of our name."[1]

Neutral territory inviolable by belligerents.

One topic only remains for consideration, embraced within the general subject of this chapter—and that is, the immunity of neutral territory from the violence of belligerents.

It is a well-established principle in the law of nations, that no hostile operations can be conducted or committed in a neutral territory. This immunity extends not only to the actual territory, but the entire neutral jurisdiction, which includes the ports, harbors, and bays of a neutral state, and such distance from the shore as the custom of

[1] Mackintosh's Life, by his Son, vol. II., 393, 394.

nations admits or establishes as within jurisdictional limits—a marine league being the distance usually so considered.

Captures illegal made within neutral jurisdiction.

It follows, therefore, that if captures are made by belligerent parties anywhere within such neutral jurisdiction, they are illegal and void, and restitution of the captured property must be ordered on behalf of the owner or claimant. This doctrine is asserted by all the great writers upon the law of nations, with but one exception, that of Bynkershoek, who, while admitting the general validity of the rule of immunity, contends that an exception or qualification exists in the case of a vessel that has been chased by a cruiser within neutral jurisdiction, and has been captured there *dum fervet opus*, if such capture can be made without injury to the neutral power. But this exception seems never to have been recognized or acted upon; on the contrary, the immunity has been uniformly held to be absolute, without any exception whatever.[1]

So vigorous, indeed, has been the enforcement of this rule, that prizes made by vessels cruising off and on or near a neutral port, have been ordered to be restored by the British courts of admiralty; and many neutral states have adopted regulations whereby a belligerent vessel is not allowed to leave their ports within twenty-four hours after the departure of another belligerent vessel from the same port.

Neutral states no power to release cap-

But though captures may not be made within neutral jurisdiction, yet, being made outside, and

[1] Bynkershoek, Qu. Jur. Pub., Lib. I., c. viii.; *vide* Jefferson Correspondence, vol. III., page 243 *et seq.*

tures brought into their ports by belligerents.

brought into neutral ports, no power of restitution or release exists on the part of the neutral, except where some treaty intervenes, or the capture has been made in violation of its own neutrality laws and regulations.

Formerly captors were not allowed to carry their prizes into neutral ports; now, however, the custom and practice of nations is altogether otherwise, and it is the invariable opinion, even of such as are most jealous of neutral rights and privileges, that a neutral state has no power to interfere with prizes brought into her ports, with the exception specified.

In a great number of instances, however, treaty stipulations have intervened, and changed the rule of non-interference.

As early as the year 1406 such a treaty was made between Henry IV. and the Duke of Burgundy.

The United States government has a treaty stip ulation, modifying the rule of non-interference, so far only as to prohibit the sale of prizes taken by belligerents at war with either party in their ports, with France, in 1778; and again in 1800, a treaty between the United States and the United Provinces, made in 1782, allows to each party the right to sell any prizes brought by it into the ports of the other.

No treaty stipulation upon the subject exists between the United States and Great Britain.

THE CASE OF THE "TRENT."

Since the publication of the first edition of this work, a case of historic interest and importance has arisen, growing out of the civil war in the United States, connected with the subject of the foregoing chapter, which demands something more than a cursory notice, for it involves a virtual abandonment by Great Britain, of certain belligerent rights, as against neutral commerce, always theretofore pertinaciously asserted and maintained by that nation, and the consequent vindication of the position hitherto assumed by the United States government, in the negation of such asserted rights.

On the 8th of November, 1861, the United States war steamer *San Jacinto* overhauled the British merchant steamer *Trent*, in the Bahama Channel, pursuing a voyage from Havana to Southampton, England, *via* St. Thomas. In the legitimate exercise of the belligerent right of search, the merchant steamer was brought to, and upon being boarded, a demand was made for the exhibition of her papers and passenger list, to the boarding officers. This demand was resisted, and it became necessary to resort to force to accomplish the search.

On board the vessel were found two persons, named Mason and Slidell, with their clerks or secretaries. These two persons were citizens of the United States—for many years they had been senators in the Congress of the nation, and had been pampered with places of honor, and trust, and power, and emolument, in their country's service. They had become conspirators, rebels, and traitors against that country to which they owed so deep a

debt of love, and honor, and gratitude. They were leaders in that vile revolt, whose gigantic enormity of wickedness finds no parallel in the world's history.

Availing of the fit opportunity of darkness and storm, they had evaded the blockade of the port of Charleston, and were on their way, in the capacity of ambassadors, armed with dispatches from their insurgent chiefs, the one to England, and the other to France, and clothed with the mission of enlisting the sympathy and aid of those nations, in their unholy effort to extinguish republican liberty in the United States.

The character of these persons, the nature of their mission, and their clandestine departure from their country, were well known to the master and all on board the merchant vessel, who had aided in their escape, and endeavored to conceal their persons. The commander of the *San Jacinto*, notwithstanding their protest and resistance, caused these persons, with their secretaries, to be removed from the *Trent*, and taken on board his ship, in which they were conveyed to the United States, where, upon their arrival, they were confined as prisoners of state.

In his report of their capture, addressed to the secretary of the navy of the United States, on the 15th of the month, he says: "It was my determination to have taken possession of the *Trent*, and sent her to Key West as a prize, for resisting the search, and carrying these passengers, whose character and objects were well known to the captain; but the reduced number of my officers and crew, and the large number of passengers on board, bound to Europe, who would be put to great inconvenience, decided me to allow them to proceed."

There can be no doubt that, had he pursued his first intent, by the law of nations, as well established, both in Great Britain and the United States,[1] the vessel must have been condemned as lawful prize, by reason of her resistance to the search of the belligerent cruiser—and, guided alone by that law as laid down by the courts of England, her condemnation would have been quite as certain, by reason of her voluntary employment in the carrying of these rebel emissaries and their dispatches.

In the light of subsequent events, however, it may well be doubted, whether that law would have been allowed its legitimate operation, without the armed protest of that power in whose jurisprudence it was established, and whose flag had been desecrated by the infamous service in which the vessel had been employed.

The secretary of the navy of the United States, in a brief note, addressed to the commander of the *San Jacinto*, on the 30th of November following, congratulated him "on the great public service he had rendered in the capture of the rebel commissioners," and while refraining from the expression of "an opinion on the course pursued in omitting to capture the vessel which had these public enemies on board," nevertheless declares "that the forbearance exercised in this instance, must not be permitted to constitute a precedent hereafter, for infractions of neutral obligations."

Immediately after information of the arrest of these malefactors was received at Washington, the secretary of state addressed a brief note to the

[1] *The Maria*, 1 Rob., 368. *The Antelope*, 10 Wheat., 119.

American minister at the Court of St. James, stating the facts of the arrest, that it was made without special instructions from the government, and expressing a hope that "the British government would consider the subject in a friendly temper."

On the 30th of November, Earl Russell addressed a note to Her Britannic Majesty's minister at Washington, Lord Lyons, reciting a garbled and untruthful version of the case, which had been given by the officers of the *Trent*, in requital for the generous forbearance extended toward them, and proceeding as follows:

"It appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral power, *while such vessel was pursuing a lawful and innocent voyage*—an act of violence which was an affront to the British flag, and a violation of international law"—and concluding with a demand, couched in the declaration, that the "liberation of the four gentlemen named, and their delivery to your lordship, together with a suitable apology for the aggression," could alone satisfy the British nation.

Before proceeding to relate the result of this demand, and the motives which led to that result, it may be well to consider the character of the demand itself, and how far it was warranted by an infraction of international law,—upon which it is ostensibly based,—as that law has been established and administered by British authority and precedent.

It must be remembered, in the outset, that the slaveholders' insurrection against the government of the United States, so far as Great Britain was

concerned, early assumed the character of a war, in which the contending parties were vested with the like authorities and rights of belligerents, as if the contest were waged between independent nations.

This was recognized and declared, after elaborate parliamentary debate, by the terms of Her Majesty's proclamation of neutrality.

Although it was conceded at the time,[1] that this recognition might be sustained by precedent, it was, nevertheless, sufficiently obvious to any unprejudiced mind, that a generous nation, uninfluenced by those ignoble and selfish motives which would seek the overthrow of a government in which human liberty has reached a higher development than the world has yet seen, because that liberty grows out of a written constitution which asserts the capacity of man for self-government, and is not based upon the divine right of kings and lords to govern the people—a nation actuated solely by the higher, and purer, and nobler motive of promoting the cause of human liberty, wherever established, and however maintained, might properly and justly have declared that the existing precedents furnished no imperative rule of action for the case of an insurgent people, in revolt, for the avowed purpose of conquering the liberty of establishing the perpetual bondage of a portion of the human race. Yet the British nation saw fit to place itself upon other ground, and under the transparent shelter of controlling precedent, published her recognition of the belligerent *status* and rights of the slaveholding insurgents, as well as

[1] Vide *ante*, p. 13.

that of the nation against which they were in rebellion.

This is important, for the reasons solely, that the act of the commander of the *San Jacinto*, for which reparation was demanded by Great Britain, is defensible only as the exercise of a lawful belligerent right.

The right of public vessels of a belligerent nation to arrest upon the high seas, and search all merchant vessels of a neutral power, for the purpose of ascertaining if they are, in any manner, employed in the service of the adverse belligerent, is a right which has never been denied or questioned by any authority among nations.

The employment of a neutral merchant vessel in the service of a belligerent power, by the law of nations, subjects her to the penalty of confiscation, if captured by the public vessel of the adverse belligerent, while engaged in that service.

By the law of nations, as asserted by the British elementary writers, and as laid down and administered by her courts, the carrying of ambassadors, dispatches, or military persons of a belligerent, by a merchant vessel of a neutral power, is such an employment as subjects the vessel, if captured in the service, by the public ship of the adverse belligerent, to the like penalties, as if engaged in the carrying of contraband of war, for the service of the enemy.

"The belligerent may stop the ambassador of the enemy on his passage,"[1] says Sir William Scott, the great British oracle of public law. And again, he

[1] *The Atalanta*, 6 Rob., 440.

says: "It seems to me, *on principle*, to be but reasonable, that whenever it is of sufficient importance to the enemy, that *such persons should be sent out on the public service, at the public expense*, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with hostile operations."[1]

The numerous decisions, as well by the British courts of admiralty, as by the Lords, establishing this doctrine, as also the doctrine that the conveyance of hostile dispatches justly subjects the offending ship to confiscation, were cited in the first edition of this work.[2]

It should be borne in mind that there was no pretence of the practice of an imposition upon the neutral vessel, the *Trent*, by the smuggling or concealing the rebel emissaries on board of her, upon her voyage between neutral ports. Their character and mission were alike notorious; and the service was undertaken with the full knowledge that it was a service in behalf of the insurgents in the United States, recognized as belligerents by Great Britain, and it was boldly entered upon as such service.

From the notorious character of the emissaries, it was well known that their dispatches from those who sent them (their letters of authority being dispatches of the highest character), must necessarily have been borne with them, and, of course, not deposited in the mail bags of the packet.

The case, therefore, does not come within the exception suggested by Mr. Phillimore, in his able treatise on international law, nor can it be regarded

[1] *The Orozembo*, 6 Rob., 434.

[2] *Vide* p. ——.

as coming within the principle urged by the justly celebrated French writer upon the rights of neutral nations, Hautefeuille, in combating the extreme doctrine upon this subject of "the official organ of the English admiralty."

"The advocate of Her Britannic Majesty, in the office of admiralty," Mr. Phillimore says, "with respect to such a case as might exempt the *carrier of dispatches from the* USUAL PENALTY, it is to be observed, that, where the *commencement of a voyage is in a neutral country, and is to terminate in a neutral port*, or at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite the vigilance of the master, and therefore it may be proper to make SOME ALLOWANCE *for any imposition that may be practised upon him.*"[1]

And Hautefeuille says:

"A packet-boat, charged with a postal service, receives all the letters, all the dispatches which are committed to it *by the post-office*, without exception —it is not thus acting for a special case—is not in the service of the belligerent state, and simply discharges the mission intrusted to it in peace as well as in war. If, *among the letters with which it is thus freighted*, there be found dispatches of war, whatever may be their importance, the vessel has failed in none of the duties of neutrality, has committed no act of war, has not become denationalized, since she has simply performed the commission intrusted to her by her own government, a neutral government, and a commission compatible

[1] 3 Phill., 371.

with the duties of neutrality. Moreover, it can be affirmed that she has committed no act of contraband of war."[1]

And again, he says: "The opinion of Sir William Scott can have no weight in my eyes. As the official organ of the English admiralty, he was bound to sustain the doctrines of his country. He has clothed them with all the prestige of his learning and his talent. But if we adopt his system, all correspondence would become impossible in time of war, between neutrals and belligerents, and even very difficult between nations remaining loyal spectators of the struggle, except through the intervention of the belligerent that is most powerful on the sea." "No neutral ship would consent to take charge of the postal service, in the fear that a suspected letter should be found among the dispatches, and thus compromise her safety. Consequently, the belligerent that was the most powerful, would alone become charged with the maritime correspondence of the world, and it is easy to comprehend the advantage it might draw from the monopoly."[2]

Regarding the employment in which the *Trent* was engaged, solely in the light of British authority, to be characterized in conformity with British precedent, maintained by that government in the plenitude of her belligerent power, against the protests of all neutral nations, one may not readily reconcile the assertion, that the obnoxious individuals were "taken from on board a British vessel,

[1] *Droit des Nations Neutres*, 465.

[2] Hautefeuille, *Droit des Nations Neutres*, 466, 468.

the ship of a neutral power, WHILE SUCH VESSEL WAS PURSUING A LAWFUL AND INNOCENT VOYAGE," with that high-toned integrity which should ever pervade the public declarations of those who are intrusted with a nation's destiny, and which has been not unfrequently paraded as the peculiar attribute of the British statesman.

For what particular cause, or on what specific ground, the removal of the emissaries of the insurrectionists from on board the *Trent*, by the commander of the *San Jacinto*, was regarded as a violation of international law, Earl Russell does not venture to state in his note to Lord Lyons.

But the world is not left in ignorance of the real and sole cause of complaint, and that cause sufficiently accounts for this singular reticence of the British minister.

Publicity has been given to the professional opinion of the law officers of the British Crown, and the action of the government is known to have been based upon that opinion.

Had Earl Russell expressed the precise ground of complaint of the removal of the rebels from the British vessel, as an infraction of international law, as the same is embraced in the opinion of the law officers, the world would have read in amazement, substantially as follows:

"We do not complain that a public armed vessel of the United States subjected a British mail steamer to visitation and search upon the high seas;

"We do not contend that the British mail steamer was not lawfully subject to capture and confiscation, for resisting the exercise of this belligerent right;

"We do not contend that the British mail steamer, although upon a voyage between neutral ports, was not lawfully subject to capture and confiscation by a cruiser of the United States, for being employed in carrying the ambassadors of the adverse belligerent of that nation, with their hostile dispatches, with full knowledge of their character and mission, and that they must have been the bearers of such dispatches:

"But we do complain that the commander of the ship of war of the United States did not make capture of the British mail steamer, place a prize crew on board, and carry her, with her cargo, into a port of the United States, for adjudication in her courts as lawful prize of war, leaving her numerous passengers to find their way to their homes as best they might, and to find their damages for detention and delay, against the owners of the British mail steamer, as best they could;

"And we do complain that, instead of the exercise of this generous and merciful forbearance, by the commander of the *San Jacinto*, he contented himself with the simple removal of the hostile ambassadors, with their hostile dispatches, from the offending vessel (they not being apparently officers in the naval or military service of the enemy), thus usurping the authority vested in the prize courts of the United States, and substituting the adjudication of a naval officer for that of a judge of his country, vested with the power of administering international law."

In such terms must have been conveyed the expression of what is perfectly known to have been the true ground upon which the British cabinet

saw fit to regard the act in question as an infraction of international law. It will be conceded that it was wise to be silent.

But how stands British authority and British precedent upon this question of the right of removal of hostile ambassadors and dispatches from a neutral vessel, by a public belligerent cruiser, the sole ground of British complaint of the act of the commander of the *San Jacinto*, as a violation of international law?

During the war between Great Britain and her colonies, afterward the United States, the colonial government dispatched as ambassadors to Holland, then a neutral power, Henry Laurens, a former President in the Congress of the country, vested with power to secure from that power a recognition of the united colonies as an independent nation—to conclude a treaty, and to negotiate a loan. In 1780 he left Charleston, on board the brigantine *Adriana*, bound to Martinique. From thence he took passage in a Dutch packet, the *Mercury*, for Holland, and thus, was on board a neutral vessel, sailing between neutral ports.

When three days out from Martinique, the *Mercury* was overhauled by the British frigate *Vestal*. Mr. Laurens, with his secretary, were forcibly removed from on board the *Mercury;* his papers were seized; they were taken in the *Vestal* to St. Johns, Newfoundland, and thence, by an order of the British admiralty, he, with his secretary, were taken to England, and he was committed, as a prisoner, to the Tower of London, on a charge of high treason. The British reverse at Yorktown soon changed the character of his confinement to that of

a prisoner of war, and he was, not long thereafter, released, in exchange for Lieutenant-general Lord Cornwallis.[1]

Where is the failure of analogy, in any single point, between this remarkable British precedent and the case under consideration?

During the period which succeeded the recognition by Great Britain of the independence of the United States, and the declaration of war of 1812, between those nations, the diplomatic correspondence between the two governments is mainly devoted to the persistent assertion and maintenance of this alleged belligerent right of the cruisers of Great Britain, of arresting neutral vessels upon the high seas, and upon the mere *sic volo, sic jubeo* of the naval commander, removing therefrom any person therein claimed to be a British subject, and the constant denial of, and protest against, such asserted right, on the part of the government of the United States.

Numberless were the victims of this asserted belligerent right. Two nephews of Washington, as stated by Mr. Jefferson, on their return from Europe, were forcibly removed from the protection of the flag of the United States, and compelled to the service of seamen, under the discipline of a British man-of-war. During the discussion of the subject on the floor of the British House of Commons, Lord Castlereagh conceded that a government investigation had disclosed the fact that in the British fleet there were three thousand five

[1] *Vide* Sparks' Diplomatic Corrrespondence of the Revolution, vol. 2, p. 461.

hundred men claiming to be impressed Americans. And, it is said, that six thousand of such cases were recorded in the state department of the United States. Six thousand times, as it has been truly said, "American citizens, without any form of law, at the mere mandate of a navy officer, who, for the moment, acted as a judicial tribunal, were dragged away from the protection of the American flag, and the deck which should have been to them a sacred altar."

For the avowed purpose of asserting a municipal claim to personal service, the belligerent right of search was invoked, and six thousand times the quarter-deck of British cruisers became "a floating judgment-seat," upon which were sacrificed the dearest rights of American citizens. And how shall be compared the municipal claim of Great Britain to the personal service of her subjects as seamen in her navy, upon which alone the exercise of this right was sought to be vindicated, to the municipal claim of the United States to the persons of these her rebel citizens and traitors, that they might be visited with the just punishment of treason, and thereby be made to serve as an example and a warning to coming generations!

Although the war of 1812, between Great Britain and the United States, was mainly incited by the persistent exercise of this asserted right by the British government, it was not renounced by that power, at the treaty of peace concluded at Ghent, and the negotiations which from time to time have been set on foot by the United States government, during the administration of each succeeding President, with the express purpose of procuring from

Great Britain a renunciation of this asserted claim of right, have all been unavailing.

No recorded act of Great Britain, since her existence as a belligerent power, until the 30th of November, 1861, the date of the demand upon the United States government, contained in the note of the British Premier to Lord Lyons, can be construed into a renunciation of what the Prince Regent (afterward George IV.) proclaimed at the palace of Westminster, in 1813, as the "UNDOUBTED, and HITHERTO UNDISPUTED right of *searching merchant vessels* in time of war, and the *impressment of British seamen when found therein*."

Having thus considered the character of the demand made by Great Britain upon the United States, for the surrender to the former power, of the traitorous citizens of the latter, taken by an American cruiser from on board a British merchant vessel, employed to carry them upon their traitorous mission, and having seen how utterly unwarranted was that demand, by reason of any violation of international law, in their capture and removal, as that law has been established and administered by British authority and British precedent, it may be safely left to the judgment of impartial history to determine, whether, under all the circumstances, such a demand was altogether fit to be made; and whether, that nice sense of national honor, which is the basis of public security, and which comprehends as well the integrity that will not offer, as the spirit that will not submit to an injury, did not imperatively forbid it.

That such a demand made upon Great Britain while a belligerent, by a neutral nation, would have

been met by instant rejection, and its enforcement by armed resistance to the end, no one can doubt who is at all familiar with the claims hitherto asserted and maintained by that power. It was probably the conviction that such, under the like circumstances, would have been her own action, which led to the conclusion that it would be the course pursued by the United States, for the demand was immediately followed by gigantic war-like preparations and expenditures on the part of Great Britain, in the avowed anticipation of hostilities between that country and the United States.

But, for such cause, this was not to be. Far otherwise, and in manner more noble than by an appeal to arms, was the honor of the latter nation triumphantly vindicated.

On the 27th of December, shortly after the British demand was communicated by Lord Lyons to the American government, her secretary of state addressed his reply to the British minister. In that paper, Mr. Seward, at great length, and with the dignified and masterly manner which characterizes all the productions of that distinguished statesman, analyzes the principles of international law which are involved in the case, and shows that an adherence to those principles for which the government of the United States, as a neutral power, has contended against Great Britain, as a belligerent, since her independent existence, imperatively requires a compliance with the demand which Great Britain saw fit to make. And in view of the opportunity which the case afforded, for the assertion of those principles in such manner as could not fail to establish a precedent, of a character so memorable and

decisive as to be binding, in the eyes of the world, upon the future action of Great Britain, the distinguished secretary might well say, in closing his response, "The four persons in question will be *cheerfully* liberated."

It did not, of course, comport with the character of a public document of the nature of a diplomatic note, to enter upon a detailed exposition of the history of the prolonged contest by the United States, for the supremacy of those principles of public law which this demand by Great Britain at length presented the happy opportunity to consummate. That task remained to be performed. On the 6th of January, 1862, the President of the United States transmitted to the Senate a message, relative to the recent removal of certain citizens of the United States from the British mail steamer *Trent*, by order of Captain Wilkes, in command of the United States war steamer *San Jacinto*. On a motion to refer that message to the committee on foreign affairs, Mr. Sumner, the chairman of that committee, addressed the Senate upon the subject, in a speech which will be preserved with the juridical learning of the age, as one of its noblest monuments.

In that speech, the distinguished senator from Massachusetts (of whom it may be as truly said as of him to whom the praise was first accorded, "*multum quod tetigit non ornavit*") fairly and nobly completes and rounds off the labor, which had been left, "in outline rough and bold," by the secretary of state.

The senator premises, that, "If this transaction be regarded exclusively in the light of British precedents—if we follow the seeming authority of

the British admiralty, speaking by its greatest voice; and especially if we accept the oft-repeated example of British cruisers, upheld by the British government, against the oft-repeated protests of the United States, we shall not find it difficult to vindicate it. The act becomes questionable, only when brought to the touchstone of those liberal principles, which, from the earliest time, the American government has openly avowed and sought to advance, and which other European nations have accepted, with regard to the sea. Indeed, Great Britain cannot complain, except by now adopting those identical principles, and should we undertake to vindicate the act, it can only be done by their repudiation." And again:

"A question of international law should not be presented on any mere *argumentum ad hominem.* It would be of little value to show that Captain Wilkes was sustained by British authority, if he were condemned by international law, as interpreted by his own country. It belongs to us, now—nay, let it be our pride, at any cost of individual prepossessions or transitory prejudices, to uphold that law in all its force, as it was often declared by the best men in our history, and illustrated by national acts; and let us seize the present occasion to consecrate its positive and unequivocal recognition.

"In exchange for the prisoners set free, we receive from Great Britain a practical assent, too long deferred, to a principle early propounded by our country, and standing forth on every page of her history.

"The same voice which asks for their liberation, renounces, in the same breath, an odious pretension, for whole generations the scourge of peaceful commerce."

The Senator then proceeds to consider the several grounds upon which the lawfulness of the removal of the rebel emissaries, on the capture of the vessel which was carrying them, might be predicated, and shows that—

1. By the public law, as uniformly asserted and maintained by the United States, the seizure and removal of the persons of the rebels, without taking the ship into port, was unlawful—*inasmuch as a naval officer is not entitled to substitute himself for a judicial tribunal.*

2. By the public law, as asserted and maintained by the United States, the neutral vessel was not liable to capture, and could not have been lawfully condemned, if taken into port, for the offence of carrying the rebel emissaries, *inasmuch as neutral ships are free to carry all persons, not apparently in the military or naval service of the enemy.*

3. By the public law, as asserted and maintained by the United States, the neutral vessel was not liable to seizure for carrying hostile dispatches, inasmuch as such dispatches are not contraband of war. And,

4. By the public law as asserted and maintained by the United States, the *Trent* was not liable to arrest, as the carrier of hostile dispatches, inasmuch as she was a neutral vessel, sailing, at the time, between neutral ports.

And, first, as to the unlawfulness of the seizure and removal of the rebel emissaries, without taking the ship into port—after reviewing the early and persistent pretension and practice of Great Britain in opposition to the principle asserted and urged by the United States, the senator says:

"Protest, argument, negotiation, correspondence, and war itself—unhappily the last resort of republics as of kings—were all employed in vain by the United States to procure a renunciation of this intolerable pretension." "But," he proceeds, "I do not content myself with asserting the persistent opposition of the American government. It belongs to the argument, that I should exhibit this opposition and the precise ground on which it was placed—being identical with that now adopted by Great Britain—and here the testimony is complete."

He then cites the authentic records of his government:

During the administration of Washington, from the letters of Mr. Jefferson, his secretary of state, to Mr. Pinckney, the American Minister at London, of the 11th of June and the 12th of October, 1792.

During the administration of John Adams, from the letter of Mr. Pinckney, his secretary of state, to Rufus King, the American Minister at London, of the 8th of June, 1796; and during the same administration, from the letter of John Marshal, then secretary of state, afterward the venerated Chief-Justice, to Rufus King, of the 20th of September, 1800.

During the administration of Jefferson, from the productions of Mr. Madison, his secretary of state, for the eight years of his Presidency, who, in his instructions to Mr. Monroe, then the American Minister at London, on the 5th of January, 1804, exposed the tyranny of the British pretension, in these emphatic and memorable terms:

"Taking reason and justice for the tests of this practice, it is *peculiarly indefensible, because it*

deprives the dearest rights of persons of a regular trial, to which the most inconsiderable article of property captured on the high seas is entitled, and leaves the destiny to the will of an officer, sometimes cruel, often ignorant, and generally interested, by want of mariners, in his own decisions.

"Whenever property found in a neutral vessel is supposed to be liable, on any ground, to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power. Can it be reasonable then, or just, that a belligerent commander, who is thus restricted, and thus responsible, in a case of mere property of a trivial amount, should be permitted, *without recurring to any tribunal whatever, to examine the crew of a neutral vessel, to decide the important question of their respective allegiances*, and to carry that decision into execution by forcing every individual he may choose, into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest danger? Reason, justice, and humanity unite in protesting against so extravagant a proceeding."

From year to year, from 1804 to 1812, negotiations were carried on between the representatives of the United States government and British commissioners, for the purpose of procuring a renunciation by Great Britain of this intolerable pretension, by which, in the language of John Adams, in a pamphlet issued by him upon the absorbing

theme, in January, 1809, "naval lieutenants became judges, midshipmen, became clerks, and boatswains, sheriffs or marshals."

"At last," resumes the senator, "all redress through negotiation was found to be impossible; and this pretension, aggravated into multitudinous tyranny, was openly announced to be one of the principal reasons for the declaration of war against Great Britain in 1812."

The language of President Madison, in his message to Congress of June 1st, in that year, in which he designates the offensive character of the British pretension, is especially noteworthy, because singularly coincident with that used by the professional advisers of the British crown, in their exposition of the unlawfulness of the act of the commander of the *San Jacinto.*

President Madison says: "Could the seizure of British subjects, in such cases, be regarded as within the exercise of a belligerent right, the acknowledged laws of war, which forbid an article of captured property to be adjudged, without a regular investigation before a competent tribunal, *would imperiously demand the fairest trial, when the sacred rights of persons were at issue. In place of such a trial these rights are subjected to the will of every petty commander.*"

The British writers say: "It is not to the right of search that we object, *but to the following seizure without process of law.* What we deny is, the right of a naval officer to stand in place of a prize court, and adjudicate, sword in hand, with a *sic volo sic jubeo*, on the very deck which is a part of our territory."

With what heartfelt satisfaction would such language, proceeding from the law officers of the British crown, have been hailed by the American statesmen, and how it would have cheered the hearts of the American people, of 1812.

The conclusion of the war, by the treaty of Ghent, brought with it neither renunciation nor modification of the British claim.

To effect this, other negotiations were set on foot, during the administration of President Monroe, in 1818 and in 1823, and in 1827, during the administration of John Quincy Adams. They were alike futile as those undertaken before the war. And at length, in 1842, in the negotiation of the treaty of Washington, Mr. Webster, then the American Secretary of state, announced his abandonment of all idea of further negotiation, having in view the relinquishment by Great Britain of her asserted right, and contented himself with a deliberate declaration of the principle irrevocably adopted by the government of the United States.

"Such," continues the senator, "is an authentic history of the British pretension, and of the manner in which it has been met by our government. And now, the special argument, formerly directed by us against this pretension, is directed by Great Britain against the pretension of Captain Wilkes, to take two rebel emissaries from a British packet ship.

"If Captain Wilkes is right in this pretension, then, throughout all these international debates, extending over at least two generations, we have been wrong."

Passing to the second position, of the unlawful-

ness of a capture of the neutral vessel, because employed in carrying the rebel emissaries, *inasmuch as these emissaries were not apparently in the military or naval service of the enemy*, the senator shows that, upon British authority, such a doctrine could not be maintained. "But," he adds, "the original American policy is unchangeable, and the American precedents which illustrate it, are solemn treaties.

"The words of Vattel, and the judgments of Sir William Scott, were well known to the statesmen of the United States, and yet, in the face of these authorities, the American government, at an early day, deliberately adopted a contrary policy, to which, for half a century, it has steadily adhered. It was plainly declared, that only soldiers or officers could be stopped, thus positively excluding the idea of stopping ambassadors, or emissaries of any kind, not in the military or naval service."

To this effect is cited the language of Mr. Madison, in his dispatch to Mr. Monroe, at London, on the 5th of January, 1804. "The article renounces the claim to take from the vessel of the neutral party, on the high seas, any person whatever, *not in the military service of an enemy;* an exception which we admit to come within the law of nations, on the subject of contraband of war. *With this exception*, we consider a neutral flag on the high seas, as a safeguard to those sailing under it."

To this effect was the language of the stipulation, the adoption of which Mr. Monroe was instructed to propose, as portion of the convention between the United States and Great Britain.

"No person whatever shall, upon the high seas, and without the jurisdiction of either party, be de-

manded or taken out of any ship or vessel belonging to citizens or subjects of one of the parties, by the public or private armed ships belonging to or in the service of the other, *unless such person be, at the time, in the military service of an enemy of such other party.*"

This proposed stipulation was vainly urged by the united earnestness of Mr. Monroe and Mr. Pinckney, who were joined in the mission to London.

On the 9th of April, 1805, Mr. Madison, in a communication to Mr. Merry, the then British Minister at Washington, declares that—

"The United States cannot accede to the claim of any nation, to take from their vessels on the high seas, *any description of persons, except soldiers* in the actual service of the enemy." And on the 12th of the same month, the antagonism of Great Britain to the United States upon this principle was unequivocally asserted, in the reply of the British Minister, in which, on behalf of his government, he positively repudiated the doctrine.

Further, to show the uniform adherence of the United States to this liberal principle, and her earnest advocacy of its adoption by other nations, the learned senator invokes the treaty history of his country, and points out its harmonious accordance.

The treaty between the United States and France, negotiated by Benjamin Franklin, contains the following stipulation:

"And it is hereby stipulated that free ships shall also give a freedom to goods, and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the

whole lading, or any part thereof, should appertain to the enemies of either, contraband goods being always excepted. It is also agreed, in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect—*that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers, in the actual service of the enemy.*"

Substantially the same provision was embraced in each succeeding treaty entered into between the United States and the other maritime nations of either hemisphere, with the single exception of Great Britain, whose assent to the principle was always and pertinaciously refused.

It will be found in the treaty concluded by the United States with the Netherlands, in 1782—with Sweden, in the same year—with Prussia, in 1785—with Spain, in 1795—with France, in 1800—with Columbia, in 1824—with Central America, in 1825—with Brazil, in 1828—with Mexico, in 1831—with Chili, in 1832—with Venezuela, in 1836—with Peru and Bolivia, in the same year—with Ecuador, in 1839—with New Grenada, in 1846—with Guatemala, in 1849—with San Salvador, in 1850—and with Peru, in 1851.[1]

By this unbroken chain of evidence, in the solemn form of treaty stipulation, the principle is asserted as the fixed and irrevocable policy of the United States government, by which neutral vessels are exempt from capture by a belligerent cruiser, for carrying any other persons than such as are actually

[1] *Vide* 8th, 9th, and 10th volumes of the United States Statutes at Large.

in the military or naval service of the enemy, and that no other than such persons can lawfully be removed from on board such neutral vessel.

That such, too, is the principle adopted by the French government, is declared by her minister for foreign affairs, in a diplomatic note, addressed to the American Secretary of state, upon the subject of this arrest, in which he "earnestly insists that the rebel emissaries, not being military persons actually in the service of the enemy, were not subject to seizure on board a neutral ship."

It thus appears, that Great Britain stands among the nations of the earth, in jealous conservation of her assumed rights as dictator of the sea, the sole repudiator of this principle, upon which alone her demand could be sustained for the restoration to her custody of the rebel emissaries, because removed from her merchant ship, in "violation of international law!"

The senator then proceeds to the consideration of the third position, that—

By the public law, as asserted and maintained by the United States, the neutral vessel was not liable to seizure for carrying hostile dispatches, inasmuch as such dispatches are not contraband of war.

That the Trent was the carrier of such dispatches, no one could doubt. This necessarily resulted from the character of the service the rebel emissaries were on their way to perform; and, indeed, the chief among the rebels, who assumed to appoint them to this service, has since declared that they were furnished with his appointment and commission.

That the vessel was subject to capture for this cause, by the well-settled law of Great Britain, as laid down in numerous cases in her courts of Admiralty, and in the decisions of the Lords, in which hostile dispatches are declared to be included in the list of contraband articles, we have already seen.[1]

"But," says the senator, "however binding and peremptory these authorities may be in Great Britain, they cannot be accepted to reverse the standing policy of the United States, which here, again, leaves no room for doubt."

In the treaty concluded by the United States with France, in 1778, there is an enumeration of the articles to be considered as contraband, and the article "dispatches" does not appear in this enumeration; and the subsequent provision of limitation, operates as an exclusion of dispatches, by declaring that "Free goods, are all other merchandise and *things* which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods."

The subsequent treaties concluded by the United States with other nations, containing the same enumeration and the like exclusion, long after the British decisions had become well known, by which hostile dispatches were not only included in the list of contraband articles, but were declared to be of a character so noxious, as to subject both ship and cargo to confiscation, may properly be regarded as a practical repudiation of the British doctrine.

If, then, the capture of the neutral steamer

[1] Vide *ante*, p. —

Trent because she was the carrier of hostile dispatches, would have been in "violation of international law," as it is conceded it would have been, as that law is established by the policy of the nation of the captor, Great Britain, the complaining power, is the only nation on earth which is precluded from making such complaint, because the only nation by whose tribunals the validity of a capture for such cause is asserted and maintained.

Passing to the fourth and last position, that, by the public law, as asserted and maintained by the United States, the *Trent* was not liable to arrest, as the carrier of hostile dispatches, even upon the assumption that they were contraband, because she was a neutral vessel, sailing between neutral ports, the senator clearly shows, that the principle in the law of contraband, adopted and adhered to by the United States, as set forth in her treaties with other nations than Great Britain, includes a rigid limitation of its application to *trading with the enemy.*

It is uniformly declared that the articles enumerated as contraband, are only subject to capture and confiscation, "*when they are carried, or attempted to be carried, to an enemy.*" Of course not, when carried between neutral ports, and not destined for the enemy.

But although, by the law of nations, as fixed in the policy adopted by the United States government, the neutral termini of the voyage of the *Trent* freed her from liability to capture as the carrier of contraband articles of any description, it clothed her with no such immunity under the well-settled law of Great Britain.

The great oracle of British prize law, Sir Wil-

liam Scott, in a "well-considered judgment," declares, that dispatches taken on board a neutral ship, sailing from a neutral country, and bound for another neutral country, are contraband; but that, where there was reason to believe the master ignorant of their character, "it is not a case in which the property is to be confiscated, although in this, *as in every other instance in which the enemy's dispatches are found on board a vessel*, he has justly subjected himself to all the inconveniences of seizure and detention, and to all the expenses of those judicial inquiries which they have occasioned."

And thus the senator concludes his demonstration, that upon every ground of complaint, either of the capture of the *Trent*, or the removal of the rebel emissaries, upon which a violation of international law could be predicated, such capture or removal, was unjustifiable by American authority or American precedent, but upon each point was in entire accordance with the authority, the precedents, and the persistent practice of Great Britain, for generations.

Having to deal with a British ship, the American commander, no doubt, thought he could not err in consulting and following British authority. "But," says the senator, "he was mistaken. There was a better example. It was the constant, uniform, unhesitating practice of his own country on the ocean, conceding always the greatest immunity to neutral ships, unless sailing to blockaded ports—refusing to consider dispatches as contraband of war—refusing to consider persons, other than soldiers or officers, as contraband of war—and protesting always against an adjudication of personal

rights by the summary judgment of a quarter-deck. Had these well-attested precedents been in his mind, the gallant captain would not, for a moment, have been seduced from his allegiance to those principles which constitute a part of our country's glory."

This review of one of the most interesting and memorable cases in the history of international law, cannot be more fitly closed than by quoting the language of the distinguished Senator from Massachusetts (whose learning and research has been so largely availed of in this recital), in the eloquent sentences with which he closes his masterly oration.

"Let the rebels go. Two wicked men, ungrateful to their country, are let loose, with the brand of Cain upon their foreheads. Prison doors are open, but principles are established which will help to free other men, and to open the gates of the sea. Never before, in her active history, has Great Britain ranged herself on this side.

"Such an event is an epoch. *Novus sæculorum nascitur ordo.* To the liberties of the sea this power is now committed. To a certain extent, this cause is now under her tutelary care. If the immunities of passengers, not in the military or naval service as well as sailors, are not directly recognized, they are at least implied. If neutral rights are not ostentatiously proclaimed, they are at least invoked; while the whole pretension of impressment, so long the pest of neutral commerce, and operating only through the lawless adjudication of a quarter-deck, is made absolutely impossible. Thus is the freedom of the sea enlarged, in the name of

peaceful neutral rights; not only by limiting the number of persons who are exposed to the penalties of war, but by driving from it the most offensive pretension that ever stalked upon its waves. To such conclusions Great Britain is irrevocably pledged. Nor treaty nor bond was needed. It is sufficient that her late appeal can be vindicated only by a renunciation of early, long-continued tyranny. Let her bear the rebels back. The consideration is ample; for the sea became free as this altered power went forth upon it, steering westward with the sun, on an errand of liberation.

"In this surrender, if such it may be called, our government does not even 'stoop to conquer.' It simply lifts itself to the height of its own original principles. The early efforts of the best negotiators—the patriot trials of its soldiers in an unequal war, have at length prevailed, and Great Britain, usually so haughty, invites us to practise upon those principles which she has so strenuously opposed.

"There are victories of force. Here is a victory of truth. If Great Britain has gained the custody of two rebels, the United States have secured the triumph of their principles.

"Henceforth, the statutes of the sea, refined and elevated, will be the agents of peace, instead of the agents of war. Ships and cargoes will pass unchallenged from shore to shore; and those terrible belligerent rights, under which the commerce of the world has so long suffered, will cease from troubling. In this work our country began early. It had hardly proclaimed its own independence, before it sought to secure a similar independence of

the sea. It had hardly made a constitution for its own government, before it sought to establish a constitution similar in spirit, for the government of the sea. If it did not prevail at once, it was because it could not overcome the unyielding opposition of Great Britain. And now the time is come when the champion of belligerent rights has changed his hand and checked his pride. Welcome to this new-found alliance. Welcome to this peaceful transfiguration. Meanwhile, throughout all present excitement, amidst all present trials, beneath all threatening clouds, it only remains for us to uphold the perpetual policy of the republic, and to stand fast on the ancient ways."

When we consider the past policy and present condition of the nation by whom the extraordinary demand in this case of *The Trent* was made—in connection with the past policy and present condition of the nation to whom it was made—it cannot but be the conviction of every honest mind, that it was a demand—not fit to be made. But what patriot of America, what philanthropist anywhere, will regret, or with bitterness remember, the temporary mortification of the concession to such a demand, if that concession shall carry with it, for the blessing of future ages, the happy result thus eloquently foreshadwed by the distinguished Senator, who spoke so nobly in its defence; if the liberal and enlightened sentiments and principles, springing from the very nature of the government, and the spirit of the institutions of the United States—and which have distinguished her policy from the beginning—shall hereafter become vital among nations; if henceforth, Christianity and civilization live and la-

bor together, in the construction of the great fabric of public law, by which alone can be secured the peace and happiness of nations; if it shall hasten the dawning of that auspicious day, when shall arise the glorious spectacle of the triumph of reason and principle, over power and interest—

> "When Sovereign law, the world's collected will,
> O'er thrones and globes elate,
> Sits empress—crowning good, repressing ill:
> Smit by her sacred frown,
> The fiend discretion, like a vapor, sinks,
> And e'en the all-dazzling crown
> Hides his faint rays, and at her bidding, shrinks."

CHAPTER VI.

Of the Prize Jurisdiction of Courts of Admiralty, and of the Practice and Proceedings of Prize Courts.

Prize jurisdiction exclusively vested in courts of admiralty.

Judicial tribunals, constituted for the purpose of passing upon questions of maritime capture, though different in different countries, are in all nations distinct from the ordinary municipal tribunals.

They are commissioned to decide in accordance with the law of nations and the conventional obligations of treaties; and therefore in the proceedings adopted for their administration of the law, and in the rules of evidence by which they are guided, they bear no analogy to the ordinary municipal or common law tribunals.

In United States and Great Britain.

In the United States and Great Britain, the exclusive jurisdiction of maritime captures is vested in courts of admiralty, which in the exercise of this power are usually denominated prize courts.

Courts of admiralty were originally established in England, in the reign of Edward III., and their powers were limited and defined by Richard II., who first conferred the title of admiral of England on a subject, by patent granted to the Earl of Arundel and Surrey. In Great Britain, this court is held by the lord high admiral, or by his deputy, who is called judge of the court of admiralty.

In the United States, this court is held by the several judges of the district court of the United

States in their respective districts, pursuant to the powers vested in them by the constitution and laws of Congress.

In prize cases, an appeal lies in England from the courts of admiralty to commissioners of appeal, who are composed principally of the privy council, commissioned under the great seal for that purpose—and in the United States, an appeal lies from the district court to the circuit court in which the district is included, and thence to the Supreme Court of the United States.

Jurisdiction exclusive in the courts of the captor.

By the law of nations, the jurisdiction of maritime captures is vested in the courts of the captor, and the exercise of such jurisdiction has been often made the subject of treaty stipulation.

In 1794, in contravention to the established law of nations, the French government decreed that French consuls and vice-consuls in neutral territory should have jurisdiction in cases of prize brought into ports where they were stationed.

This jurisdiction was not allowed by the court of admiralty in England; and in the case of a British prize taken into Bergen, and sold under a decree of condemnation by the French consul there, Lord Stowell said: "It is, for the first time in the world, that in the year 1799 an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral territory. It has been the constant usage that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country, and before the present war no sentence of this kind has ever been produced, in

the annals of mankind, and it is produced by one nation only in this war."[1]

But jurisdiction may be exercised while the prize is in a neutral port.

Although by the law of nations, decisions in cases of maritime capture made in neutral countries are wholly without validity, yet it is well settled by the inveterate practice of all nations (against what Lord Stowell deemed the correct principle), that adjudications may be made in the court of the belligerent captor, while the prize is not in the port of his own country, but in the port of some neutral state.[2]

Decree of condemnation requisite to complete transfer of property.

A decree or sentence of condemnation by a prize court of competent jurisdiction, is now universally held to be requisite to effect a complete transfer of maritime prizes from the original owner to the captor, "it not being thought fit," to use the words of Lord Stowell, "that property of this nature should be converted without the sentence of a competent court.[3]

This doctrine has been recognized and acted upon by the Supreme Court of the United States.[4]

Decree final between the parties, but not between the governments.

But although a condemnation by a lawful prize court is final, as to the transfer of the property, yet, as between the respective governments, it may be reopened, and reparation demanded where injustice has been done. This was done by the mixed commission appointed pursuant to the provisions of the treaty of 1795 between the United States and Great Britain; and although at first the British commis-

[1] *The Flad Oyen*, 1 Rob., 1 *et seq.*, 141, 142, and notes; Kluber, Droit des Gens, Part II., Tit. ii., §§ 295, 296.

[2] *The Henrick and Maria*, 4 Rob., 43, 63.

[3] 4 Rob., 55. [4] Wheat. Elements, I., 91.

sioners objected to reconsider cases that had been decided by the English court of admiralty, their objection was overruled, and indemnity was granted in cases in which there had been a final condemnation.

The same rule was adopted between Denmark and the United States, and also between France and the United States; in each instance indemnity having been awarded to United States claimants for unjust condemnations of American property. By this salutary doctrine thus fully established, an additional guarantee is furnished to neutral commerce, that while conducted in innocence and good faith, it shall not suffer from the proceedings of belligerents.[1]

Letter of Lord Stowell and Sir John Nicholl to John Jay.

In 1794, Sir William Scott and Sir John Nicholl, at the solicitation of Mr. Jay, then the American minister at the court of St. James, prepared a statement of the general principles of proceeding in prize causes in the British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdiction. The paper is a valuable one, and, though general in its character, "as far as it goes," says Judge Story, "affords a satisfactory and luminous view of the subject." It will be found entire in the appendix.

Judge Story's notes in Wheaton's Reports.

A much more elaborate and detailed statement of the subject subsequently appeared in two notes, originally published as appendices to the first and second volumes of Wheaton's Admiralty Reports.

[1] Manning's Law of Nations, 384.

These valuable notes were prepared by Judge Story, and present a prominent instance among the many which distinguished his professional life, of the unparalleled devotion of that eminent judge to the cause of enlightened jurisprudence, as well as the lavish prodigality with which he placed at the disposal of others the inexhaustible stores of his own learning. It was his design that these notes, as well as others in the same reports, should be regarded as the work of the learned reporter; for (as he modestly writes, in a private memorandum book found among his papers after his decease) "I know full well there is nothing in any of them which he could not have prepared, with a very little exertion of his own diligence and learning." And the fact of his authorship of certain specified notes is only preserved in this private memorandum, "lest," as he writes, "the fact should transpire, and it should be supposed that he (Mr. Wheaton) is under obligation to me for notes which are his own."

Whoever now undertakes to prepare a summary of the practice and proceedings in admiralty, in the exercise of prize jurisdiction, must be largely indebted to these notes of Judge Story. Indeed, it would be almost presumptuous to expect to add any thing to the information contained in them; and the humble purpose of this chapter will be, so to methodize and arrange that information, as may, perhaps, present it in a form by which it may be more readily appreciated, and at the same time be of easier reference to the student and practitioner.

Prize jurisdiction.

As preliminary to a review of the practice and

Its extent, character, and peculiarities.

proceedings of prize courts, it is essential to consider the character, extent, and peculiarity of the prize jurisdiction of courts of admiralty.

The prize jurisdiction of a court of admiralty, is that which authorizes it to take cognizance of captures made on the sea, *jure belli*; of captures in foreign ports and harbors; of captures made by naval forces on land, of surrenders to naval forces, either solely or by joint operation with land forces, and this without regard to the character of the property captured—whether ships, goods, or mere *choses in action*; of captures made in rivers, ports, and harbors of the enemy's country; and to moneys or property paid or received as ransom or commutation on a capitulation to naval forces, whether alone or jointly with land forces, for the purpose of determining whether the property captured or surrendered, is or is not lawful prize of war—to the end, that if determined to be not lawful prize, restitution may be decreed, unconditionally or upon terms; and if it be determined that it is lawful prize, condemnation and sale may be decreed, followed by a decree of distribution of its proceeds, pursuant to the law which regulates such distribution.[1]

As necessary incidents to the prize jurisdiction, thus stated in the most general terms, courts of admiralty are vested with exclusive and plenary powers and authority over all subjects connected with captures, being considered in law as the con-

[1] *The Two Friends*, 1 Rob., 271; *Lindo* vs. *Rodney*, Doug., 613, *n.*; *W. B.* vs. *Lattimer*, 4 Dall., April 1; *Le Caux* vs. *Eden*, Doug., 608; *The ships taken at Genoa*, 4 Rob., 338; 2 Wheaton, appendix.

stitutional guardians of the interests of the public in all matters relating to prize.

But cognizance of captures made on land, by land forces only, is not taken in admiralty by virtue of any inherent powers. Whenever it exercises such a jurisdiction, it is by virtue of special powers derived *aliunde*.[1]

Although the prize jurisdiction, after it has once attached to the subject matter, may be lost, by a recapture, escape or voluntary discharge;[2] yet it is well settled that the jurisdiction cannot be affected by any change in the local situation of the property after capture, but wherever that property may be found, or the proceeds of the property, the court will follow it with its process.[3] Therefore, if the property be carried to a foreign port, and delivered upon bail by the captors, the jurisdiction of the prize court is not thereby ousted, but will be exercised by adjudication and enforcement of the stipulation.[4] So too, where a prize is lost at sea, the court has power to proceed to adjudication, either at the instance of the captors or claimants.[5] The like power exists, although the captured prop-

[1] *Anthon* vs. *Fisher*, Doug., 649, *n.*; *Maissonniaire* vs. *Keating*, 2 Gall., 325.

[2] *The Two Friends*, 1 Rob., 271, 284; *The Emulous*, 1 Gall., 563.

[3] *Hudson* vs. *Guestier*, 4 Cranch, 293.

[4] *Home* vs. *Camden*, 2 H. Bl., 533; 4 T. R. 383; *Willis* vs. *Commissioners of Prize*, 5 East., 22; *The Noysomhed*, 7 Ves., 593; *The Brig Louis*, 5 Rob., 146; *The Two Friends*, 1 Rob., 271; *The Eliza*, 1 Acton, 336; *Smart* vs. *Wolf*, 3 T. R., 223; *The Pomona*, 1 Dod., 25.

[5] *The Peacock*, 4 Rob., 195.

erty may be lying in a foreign neutral territory,[1] and even though it be sold or has passed into other hands, the court may proceed to adjudication; but it is always, in such cases, in the discretion of the court to determine if they will exercise their jurisdiction at the instance and in favor of the captors, and this they will not do, if there has been an illegal or unjustifiable conversion—but only where it has resulted from necessity or reasonable and just cause.[2]

Jurisdiction of the subject matter having been once acquired by a prize court, its authority is plenary over all the incidents necessary to its efficient exercise. It will therefore follow prize proceeds into the hands of agents, or others, who by any title hold them for the captors, and will enforce payment, with interest, in proper cases, by decree.[3]

And although such persons have given no stipulation, or an insufficient stipulation, on receiving prize proceeds, it will enforce a decree of payment, for it may always proceed *in rem*, and is not limited by the stipulation.[4] In such cases the court

[1] *Hudson* vs. *Guestier*, 4 Cranch, 293; *The Christophe*, 2 Rob., 209; *The Henrick and Maria*, 4 Rob., 43; *The Comet*, 5 Rob., 285; *The Victoria*, Edwards, 97.

[2] *The Falcon*, 6 Rob., 194; *The Pomona*, 1 Dod., 25; *L'Eole*, 6 Rob., 220; *Ladame Cecile*, 6 Rob., 257; *The Arabella and Madeira*, 2 Gall., 368; Code des prises, Guchard I., p. 118.

[3] *Smart* vs. *Wolf*, 3 T. R., 313; *Home* vs. *Camden*, 2 H. Bl., 533; *Jennings* vs. *Carson*, 4 Cranch, 1; *The Two Friends*, 1 Rob., 273; *Willis* vs. *Commissioners of Prize*, 5 East., 22; *The Noysomhed*, 7 Ves., 593; *The Princessa*, 2 Rob., 31; *The Louis*, 6 Rob., 146.

[4] *The Pomona*, 1 Dod., 25; *The Herkimer*, Stewart, 128, 2 *Hall Am. Law Jour.*, 133.

may proceed, and without the application of parties, *ex officio*, as guardian of the public interests.

Even after final sentence is pronounced, the power of the court does not cease to issue process for the enforcement of all rights, so long as any thing remains to be done touching the subject matter.[1]

Exclusive jurisdiction is also vested in prize courts, to determine all questions between captors and joint-captors, as to their rights to the proceeds of prize, and such determination is conclusive between the parties.[2]

So also as to all questions of freight, damages, expenses, and costs in cases of capture.[3]

Though a mere maritime tort, unconnected with capture, may be cognizable in courts of common law, yet it is well established that all torts connected with captures, *jure belli* are within the exclusive jurisdiction of prize courts.

In the exercise of this jurisdiction, prize courts will not only decree restitution and damages in cases of illegal capture, but as an incident to the possession of the principal cause will allow damages for personal torts, and that not only against the wrong-doer, but against the owners of the privateer offending, upon the application of the

[1] *Home* vs. *Camden*, 2 H. Bl., 533, and cases *ubi supra*.

[2] *Duckworth* vs. *Tucker*, 2 Taunton, 7; and cases *ubi supra*.

[3] *Le Caux* vs. *Eden*, Doug., 594; *Lindo* vs. *Rodney*, Doug., 613; *Smart* vs. *Wolf*, 3 T. R., 223; *The Copenhagen*, 1 Rob., 289; *The St. Juan Baptista*, 5 Rob., 33; *The Die Frie Damer*, 5 Rob., 357; *The Betsy*, 1 Rob., 93; *Jennings* vs. *Carson*, 4 Cranch, 2; *Bingham* vs. *Cabot*, 3 Dall., 19; *The United States* vs. *Peters*, 3 Dall., 121; *Talbot* vs. *Johnson*, 3 Dall., 133; 2 Brown Civ. and Adm. Law, 209.

rule of *respondeat superior;* and a liberal indemnity will be awarded in cases where it is shown that the captured crew have been subjected to gross ill-treatment.[1]

The jurisdiction of prize courts is unquestionable to decree confiscation as a penalty for falsity, fraud or misconduct, as well of citizens as of neutrals. And it is a part of the ancient law of the admiralty, independent of any statute, that captors may forfeit their rights of prize by their own misconduct; and therefore such decree of forfeiture may be declared against them (in which case the property goes to the government), where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. So too, where they have, without necessity, disposed of the prize property, before condemnation; where they have rescued the property from the custody of the marshall, commissioner of prize, or other custodian of the court; and also where they have violated the instructions of the government relative to bringing in the prize crew, and generally in all cases of deviation by the captors from the established and regular course of proceedings, the prize court requires satisfactory explanation of such deviation, before it will exercise its jurisdiction beneficially to the captors.[2]

The foregoing general outline of the prize juris-

[1] *Del Col.* vs. *Arnold*, 3 Dall., 333; *The Anna Maria*, 2 Wheat., 327; Bynkershoek, Qu. Jur. Pub. Lib., I., ch. xix; Du Ponceau's Trans., 147; *The St. Juan Baptista*, 5 Rob., 33; *The Die Frie Damer*, 5 Rob., 357; *The Lively*, 1 Gall., 315.

[2] 8 Cranch, 421; *The George*, 2 Wheat., 278; *La Reine des Anges*, Stewart, 9; *The Cossack*, Stewart, 513.

diction of admiralty will serve to elucidate the rules of practice and proceedings adopted by prize courts in its due administration.

Rules as to first duty of captors upon securing possession of prize.

And first in order for consideration, are those rules which relate to the duties of captors, after they have secured possession of their prize. The rules applicable to the evidence upon the question whether the prize is or not a lawful prize, will be more appropriately considered hereafter, on a review of the proceedings in court.

Duty of captors to exercise proper care in the safe custody of the prize.

After a maritime capture is complete, the possession of the captors is, in law, regarded as a *bona fide* possession, and they are not responsible for any loss or injuries resulting from mere accident or casualty, but are only bound for fair and safe custody, and are liable for any loss occasioned by their neglect or want of proper care. This responsibility attaches to loss resulting from misconduct of any of the agents employed by the captors, as the prize-master or prize crew—neglect in not employing a pilot.[1] In cases of gross misconduct on the part of private captors, the court will decree a revocation of their commission.[2]

Liable for negligence or misconduct.

But it is a rule of prize courts, that application for remedial process against captors for misconduct or negligence must be made without any unreasonable delay. If the injured parties lie by for such

[1] *The Betsy*, 1 Rob., 93; *The Catherine and Anne*, 4 Rob., 39; *The Caroline*, 4 Rob. 256; *Del Col.* vs. *Arnold*, 3 Dall., 333; *The Dehr Mohr*, 3 Rob., 229; *The Speculation*, 2 Rob., 293; *The William*, 6 Rob., 316; *Wilcocks* vs. *Union Ins. Co.*, 2 Binney, 574.

[2] *The Marianne*, 5 Rob., 9.

length of time that the captors may be fairly presumed to have lost or been deprived of such evidence as they might have adduced in exculpation, a monition will not issue against them.[1]

To send the prize into convenient port.

When a maritime capture is complete, it is the duty of the captors to send the vessel into some convenient port for adjudication. What is intended by convenient port has been heretofore considered.[2]

With prize-master and prize crew, unless captured crew consent to navigate.

To this end it is their duty to put on board the captured ship a proper prize-master, and a sufficient prize crew to navigate the vessel into port, unless, indeed, the captured crew consent to perform the service, which, however, they are not in general bound to do.

If they do consent, they thereby exonerate the captors from all liability for loss or damage resulting from improper or unskilful navigation.[3] If any cruelty or unnecessary force, such as putting in irons or handcuffs, is used towards the crew of a neutral ship captured, a prize court will decree damages to the injured parties.[4]

Captors prohibited from converting cargo, or breaking bulk,

Under peculiar circumstances, and in cases of overruling necessity, captors may, without being thereby deprived of the effects of a lawful posses-

[1] *The Purissima Conception*, 6 Rob., 45.

[2] *The Huldah*, 3 Rob., 235; *The Madonna del Burso*, 4 Rob., 169; *The St. Juan Baptista*, 5 Rob., 33; *The Wilhelmberg*, 5 Rob., 143; *The Elsebe*, 5 Rob., 173; *The Lively*, 1 Gall., 315; *The Washington*, 6 Rob., 275; *The Principe*, Edwards, 70.

[3] *Wilcox* vs. *Union Ins. Co.*, 2 Binney, 574; *The Resolution*, 6 Rob., 13; *The Pennsylvania*, 1 Acton, 33; *The Alexander*, 1 Gall., 532, and *S. C.*, 8 Cranch, 169.

[4] *The St. Juan Baptista*, 5 Rob., 33, *The Die Frie Damer*, 5 Rob., 357.

sion, land or even sell the prize goods. But in all such cases, the burden is upon them, to satisfy the court of their perfect good faith, and the circumstances giving rise to the necessity, otherwise any and every spoliation or damage to the captured ship, any breaking bulk, or conversion of the property, will deprive them of all benefit of capture, and subject them to a decree for damages, costs, and expenses.[1]

cept from overruling necessity.

The master, and principal officers, and some of the crew of the captured vessel, should, in all instances, be sent with the vessel into the port of adjudication. This is a settled rule of prize courts, and the importance of its invariable observance cannot be overestimated.

Duty of captors to send in master and officers, and some of the crew of the captured vessel.

During the war of 1812, between the United States and Great Britain, this rule was enforced by the special instructions of the President, and the violation of these instructions involved a loss of all benefit of capture. Captors should understand that by the established rules of prize courts, the examination of the master and officers, and if possible some of the crew, of the captured vessel, is the initiatory step in proceedings for condemnation, and without such examination (except by special permission in rare cases, showing physical impossibility), no proceedings can be taken.[2]

Great importance of this rule, and effects of its violation.

[1] *The Concordia*, 2 Rob., 102; *L'Eole*, 6 Rob., 220; *The Washington*, 6 Rob., 276; *Clerk's Praxis*, 163; *Del Col.* vs. *Arnold*, 3 Dall., 333; *The Maria*, 4 Rob., 348; *The Rendsberg*, 6 Rob., 142.

[2] *The Eliza and Katy*, 6 Rob., 185; *The Henrick and Maria*, 4 Rob., 43, 57.

On arrival at port of adjudication, first duty to notify the admiralty.

As soon as the vessel or property captured arrives at the port of adjudication, it is the duty of the captors (therein represented by the prize-master if the prize is thus sent and not carried into port by the captors themselves), forthwith to give notice of the fact of arrival to the admiralty judge, or to the prize commissioners of the port or district, and at the same time to deliver into the hands of the judge or his commissioners, all the papers and documents found on board the captured vessel, accompanied by an affidavit that the papers and documents thus delivered up are in the same condition as when they were taken, without fraud, addition, subduction, or embezzlement. The prize property is thereafter in the custody of the court, and the duty of the captors is ended until action on their part becomes necessary to procure an adjudication.[1]

To deliver up all papers and documents found on board.

With affidavit that they are in the precise condition as found when taken.

The next step in the proceeding is taken by the commissioners of prize, which leads to a consideration of the powers and duties of the prize commissioners.

Prize Commissioners. Their appointment, powers, and duties.

Prize commissioners are officers of the court of admiralty. They are appointed and commissioned by the court, and hold their office during the pleasure of the court, or until the termination of the war which occasioned their appointment; and the court may appoint as many in number as the exigencies require. The purpose of their appointment is to relieve the court from the performance of many of the onerous duties to which the exercise of prize

[1] Ordonnance de la Marine, 1681, Tit. 9, Art. 21; Coll. Mar., 168.

jurisdiction of necessity gives rise. In the name of the court they receive possession of the prize property when brought within its jurisdiction, as well as the papers and documents found and taken with it; and it is their duty to enclose the papers and documents in a secure enclosure, and the same to seal with their proper seal, and then to lodge them in the registry of the court. So, too, with regard to the prize property, it is their duty to place their seal upon the hatches of the vessel, and upon whatever doors, coverings or enclosures of any kind are used to shelter and protect the cargo, so that the same cannot be tampered with without violation of their seal. It is their duty to appoint proper custodians to be left in the charge and safe-keeping of the prize property, so long as the same shall remain in court, or until the possession of the commissioners shall be superseded by that of the ordinary officer of the court, the marshal.

To take the testimony of the master, officers, and prize crew.

The papers, and documents, and prize property, being thus secured, in the custody of the court as the guardian of the public interests, it is next the duty of the commissioners to proceed without any delay whatever, that is to say, as soon as possible after the arrival of the vessel, to take the examination of witnesses, who are to be none others than the master, officers and crew of the captured vessel, or persons actually on board at the time of the capture. The examination is always confined to such persons in the first instance, and is never extended save by special permission or upon an order for further proof. Inasmuch as the hearing before the court is to be primarily, in all cases, upon the papers and documents, and the examination of the persons on

Rules as to examination of witnesses.

board brought in with the prize, and upon no other evidence whatever, the rules of the court require a strict adherence to all the prescribed formalities in the taking of this testimony. These rules are as follows :

First. The witnesses must be produced before the commissioners in succession, so that all may be examined, before the examination of any one is transmitted to and filed with the court. After such transmission no other witness can be examined without a special order of the court.

Second. The witnesses must be examined separately and apart from each other, and without the instruction or presence of counsel, or of any other person than the commissioners, their clerk, secretary or actuary, and agents of the parties, other than professional; and during the examination the witnesses are not allowed to communicate with or be instructed by counsel. If professional counsel were allowed to be present at the examination, and especially if they were allowed to take notes of the testimony, the purpose of the rule, which rigidly requires the witnesses to be examined apart from each other, might be entirely defeated.

Third. The examination of the witnesses is, in all cases, to be on the standing interrogatories *in preparatorio*, as they are denominated. The standing interrogatories used in the English courts of admiralty, have been drawn with great care and precision, and contain sifting inquiries upon every point which may possibly affect the question of prize. These interrogatories, which may be found in 1 Robinson's Reports, 381, have served as a

model for other courts. With some additions, but with little variation, they have been adopted by the several district judges in the courts of the United States, and with some modifications prepared by the learned judge for the southern district of New York, will be found in the appendix, together with the prize rules adopted by that court.

Fourth. In the taking of the examination of witnesses, it is the duty of the commissioners to require each question to be answered, and to write down the answers, or cause them to be written down, fully and perfectly, so as to meet the point of every inquiry, and not allow the witness to evade a searching question by vague or ambiguous statements. In the event of a refusal of a witness either to answer at all, or to answer fully, it is the duty of the commissioners to certify the fact to the court, in which case, not only is the witness subjected to the penalty of imprisonment for contempt, but the owners of the ship and cargo may be subjected to the consequences of a wilful suppression of evidence.

Fifth. After the examination is complete, it is the duty of the commissioners to read or cause to be read to the witness, each sheet of the same, and require him to sign each sheet separately, and also to affix thereto their own signatures, or the signature of one of them, if only one be present, or the commissioners jointly or separately, as they please, and as emergencies may require.

Sixth. When the examination of all the witnesses is concluded, it is the duty of the commissioners securely to enclose the same, and cause it to be sealed with their seals, and, together with any papers and documents found on board the vessel,

and not before lodged in the registry of the court, to be forthwith transmitted to the court; and no papers or documents found on board, and not delivered to the judge or the commissioners before, or at the time of, the examination, will be admitted in evidence.

These several rules of practice will be found to be recognized and established in many decided cases.[1]

The libel in prize and its proper form.

As soon as the papers, and documents, and preparatory examinations are transmitted to the registry of the court, it is the duty of the captors, without delay, to apply to the court for adjudication; and in case of neglect or refusal on their part, the claimants may do so. This is done by libel. The prize libel should be general in its allegation, containing no special averments of the circumstances on which the captors base their claim to condemnation; but simply setting forth the bringing the vessel in, and the proceedings against her, and alleging generally that she is a subject of prize rights. They are not required to state their grounds. They are entitled to institute the inquiry, and take the chances of the benefit of any fact that the inquiry may elicit.[2] This is considered an advantage in favor of the captors, but controlled by their liability for costs and damages, if the inquiry should prove futile; and over-balanced by the advantage in favor of the claimant, that all the evidence upon which the

[1] *The Eliza and Katy*, 6 Rob., 185; *The Henrick and Maria*, 4 Rob., 43; *The Speculation*, 2 Rob., 243; *The William and Mary*, 4 Rob., 381; *The Apollo*, 5 Rob., 286; *The Vigilantia*, 1 Rob., 1; *Jennings* vs. *Carson*, 4 Cranch, 2.

[2] *The Adeline*, 9 Cranch, 244; *The Fortuna*, 1 Dod., 81.

libel must be heard, in the first instance, proceeds from himself, his own documents, his own witnesses, —the captors not being permitted, except in cases marked by peculiar circumstances, to furnish any evidence whatever.

By whom filed.

The prize libel is filed by a proctor for the captors. In England, in cases of capture by government ships, the libel is filed and the proceedings conducted by the officers of the government exclusively; for it is there held, that the crown possesses the power to release the prize, against the will and in defeat of the rights of the captors, at any time before adjudication.[1] In the United States, although the courts have never been required to pass upon the question, it is not probable that the same exclusive authority would be recognized; for there, after the libel is filed, the power is vested in the court alone, and no release or restitution of the property can be made but by a decree of the court.[2] It was suggested by Judge Story, that in such a case, and where the libel was filed by the district attorney, the court would, in the absence of the captors, appoint a proctor to represent their interests.

Monition and warrant.

Upon the filing of the libel, a monition forthwith issues, citing all persons interested, to appear at a day named therein (which, in England, is twenty days, but in the United States is fixed at the discretion of the district judge), and show cause why the property should not be condemned as

[1] *The Elsebe*, 5 Rob., 155, 173.

[2] *Vide* Appendix of Supplementary Rules and General Principles announced by the United States Judge of the District of New York.

prize; and in England, as well as in the United States, the monition usually includes a warrant to take possession of the property. The necessity of such a warrant is apparent, where the property, as in England, is in the custody of the captors, until the filing of the libel; but not so apparent, where, as in the United States, it is already in the custody of the court; for it would be a mere transfer from the custody of the commissioners who are officers of the court, to that of the marshal, who is also an officer of the court. But this change of custody, under a warrant issued with the monition, has been the usual practice in the United States; and when the marshal thus takes possession, he is bound to keep the property *in salva et arcta custodia;* and if, by his negligence, any loss happens, he is responsible to the court; for he, like the commissioners, is the mere agent of the court, engaged to make effective its guardianship.

Service of monition.

The monition is served in England by posting a copy at the Royal Exchange, in London; in the United States, by posting a copy on the mast of the prize vessel, and wheresoever the judge may direct, and also by publication in the newspapers of the place or vicinity.

Proceedings on return day if no claim filed.

If, upon the return day of the process, no claim is or has been interposed, a default is entered of record, and the court thereupon proceeds to examine the evidence; and if the proof of enemy's property—or of lawful prize for any sufficient cause, if it be not enemy's property be clearly established—will immediately decree condemnation. If, upon the evidence, the case appear at all doubtful, a decision will be postponed.

It has been customary, by the modern practice, not to condemn merchandise in default of claim, till a year and a day have elapsed after the service of process, except where the presumption is strong of enemy's property, upon reasonable evidence.[1]

If, however, a claim be interposed, the cause is to be heard in its proper order, upon the ship's papers and the preparatory examinations. This brings us to a consideration of the claim made, in opposition to the alleged rights of the captors, and the rules by which it is governed. The claim.

The claim must be made by the parties interested, if present, and if not, by the master of the vessel, or by some agent of the owners of the property. It must be made by the general owner of the property; one who has a lien upon it for the payment of a debt, liquidated or not, is not entitled to claim, nor is a mortgagee where the morgagor remains in possession. A mere stranger is not permitted to interpose a claim, to speculate on the chances of restitution.[2] By whom made.

It is a general principle, well established, that no one can be allowed to claim in a prize court, where the transaction in which he is engaged is in violation of the municipal laws of his own country.[3]

[1] *The Harrison*, 1 Wheat., 298; *The Staadt Embden*, 1 Rob., 26; *The Avery*, 2 Gall., 308.

[2] *The Betsy*, 1 Rob., 98; *The Mentor*, 1 Rob., 181; *The Huldah*, 3 Rob., 239; *The George*, 3 Rob., 129; *The William*, 4 Rob., 215; *The Susanna*, 6 Rob., 48; *The Tobago*, 5 Rob., 218; *The Frances*, 8 Cranch, 235, 413; *The Marianna*, 6 Rob., 24; *Bolch* vs. *Darrel*, Bee., 74.

[3] *The Walsingham Packet*, 2 Rob., 77; *The Etrusco*, 4 Rob., 262; *The Cornelius and Maria*, 5 Rob., 23; *The Abbey*, ib., 251; *The Recovery*, 6 Rob., 341.

Nor can one be allowed to interpose a claim who is engaged in a trade forbidden by the laws of nature, of his own country, and of the forum.[1] Unless under a flag of truce, a pass, license, treaty, or some public act of suspension of hostile character, the rule is inflexible that an enemy cannot interpose a claim.[2]

And even where a capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution cannot be made by the enemy in person, but must be by the neutral government. The form of the claim consists of a simple statement of ownership and denial of lawful prize. It is not amendable, as a matter of course, nor will an amendment be allowed to correct the generality of a claim, unless sufficient excuse is shown for the omission on filing.[3] An appearance by a proctor for the claimants duly entered, cures all defects of process, such as the want of monition or of due notice; and a general appearance for one partner is binding upon all, even though the one had no special authority to appoint a proctor.[4] The claim must, in all cases, be accompanied by an affidavit of the claimant or his lawful representative (where the owner is absent at a great distance), specifying the facts on which the claim is based, and their verity; and before a claim is filed, accompanied by a special affidavit of the facts relied on to sustain it, it is a settled rule that no party is permitted to examine the papers filed or the pre-

Affidavit of claimant.

[1] *The Amedie*, Edinburgh Review, Vol. XVI., No. 21, p. 426.

[2] *The Hoop*, 1 Rob., 196; *The Vrow Catherina*, 5 Rob., 15, and note to 3 Rob., 162.

[3] *The Graaf Bernstoff*, 3 Rob., 109; *The Sally*, 3 Rob., 179

[4] Penhallow *vs.* Jones, 3 Dallas, 87.

paratory examination which has been transmitted to the court. Such examinations, as enabling parties to shape their claims to suit the case as established, might lead to very great abuses. Where, however, a reference to the ship's papers may be essential, to enable a party to state in his affidavit the particulars of his claim, in such case, and upon a special application, setting forth the particular paper or fact sought to be ascertained, the court will allow an examination of the paper specially relating to that particular named in the application.[1] As a general rule, it is settled, that no claim which is directly antagonistic to the ship's papers and the preparatory examination can be admitted. This, however, applies to cases arising during, and not prior to, the war. And when a necessity of a simulation of papers, can be shown by a citizen, as in the case of trade with the enemy licensed by the state, the rule is not so unbending as to exclude his interest.[2]

Papers in registry not examinable until after claim and affidavit filed.

It is a mistaken idea that has been entertained, that after an appraisement of property brought in as prize, the claimant is entitled to its delivery to him as of course, upon the execution of sufficient bail therefor. This is not so, for it is an established rule of prize courts, never to allow property to be delivered on bail, except by the consent of all the parties, prior to a hearing, in the first instance, upon the ship's papers and the examinations *in preparatorio.*

Claim for delivery on bail.]

If any of the prize property be perishable, an interlocutory decree of sale may be had, so that no inconvenience can result from an adherence to

[1] *The Port Mary*, 3 Rob., 233.

[2] *La Flora*, 6 Rob., 1; *The Anna Catherina*, 5 Rob., 15.

the rule, whereas its violation would inevitably lead to fraudulent practices.[1] Even after a hearing, if the claim should be rejected, or be affected by an imputation of fraudulent or unlawful conduct, although an appeal be interposed, the application for a delivery of the property on bail will not be granted. But if the claimant should obtain a decree in his favor, interposition of an appeal by the captors, will not prevent a favorable consideration, by the court, of an application for delivery of the property on bail. And such an application is always listened to, if, after the hearing, the case be so doubtful that an order for further proof is directed by the court.

In all cases, the hearing in the first instance, is upon the libel and claim, the ship's papers and documents found on board, and the examination of the master and officers and crew of the captured vessel. "This is not," as Judge Story says, "a mere matter of practice and form; it is the very essence of the administration of prize law, and it is a great mistake to admit the common law notions in respect to evidence to prevail in proceedings which have no analogy to those at common law."[2]

Effect of decree of condemnation on hearing.

If, upon the hearing, a decree of condemnation be rendered, and the claimants appeal therefrom, the captors are, in general, entitled to a delivery of the prize property upon bail; but if there be no appeal, then the decree of condemnation is forthwith executed by a sale and distribution of the proceeds.

[1] *The Copenhagen*, 3 Rob., 178.

[2] Wheaton, 494, note; *The Francis*, 1 Gall., 614, and 8 Cr., 348; *The Diana*, 2 Gall., 164; Pratt's Story, 69.

In prize courts, as in all other judicial tribunals, there are certain legal presumptions which affect the parties, and are regarded as of general application. Thus, possession is considered as prima evidence of property;[1] and thus, the title to property captured, is presumed to be in the enemy, in the absence of all evidence to establish any proprietary interest.[2] And so, too, goods found in an enemy's ship, are presumed to be enemy's property, unless accompanying them there be documentary proof of a distinct neutral character.[3] Where property falls within the character of contraband, it is presumed not to be the product of the claimant's own country, which exempts it from seizure, unless that fact be proved by the claimant.[4]

Presumptions of law in prize-courts.

And the burden of proof resulting therefrom.

A merchant transacting business as such, is presumed to be doing so on his own account; but if the person acting be not a merchant, that may give a qualified character to his acts.[5]

Where a ship has been captured and carried into the port of an enemy, and is subsequently found in the possession of a neutral, the presumption is, that there has been a regular condemnation and sale, and it is incumbent on the party claiming the property from the neutral possession, to prove the contrary.[6]

Where, by the provisions of a treaty, persons happening to be settled in a ceded port, are to remove

[1] *Miller* vs. *The Resolution*, 2 Dall., 19.

[2] *The Maynus*, 1 Rob., 31.

[3] Loccenius, Lib. II., c. ii., n. 4; Gros de Jur. Bel. et Pac., Lib. III., c. vi., § 6.

[4] *The Twee Juffrowen*, 4 Rob., 242.

[5] *The Jonge Pieter*, 4 Rob., 242.

[6] *The Countess of Lauderdale*, 4 Rob., 283.

therefrom, the presumption is in their favor, and must be rebutted by proof that they did not intend to remove.[1]

The testimony of the master of the captured vessel as to her destination, and also as to the alleged treatment of the crew, is held conclusive upon these points, if it be not contradicted or fairly discredited.[2]

The national character of prize property the principal question discussed on the hearing.

The national character of the captured property is, in the large majority of cases, the principal question discussed on the hearing. The determination of this question depends upon many and various circumstances, such as the habits and trade of the ship, the nature of the voyage and cargo, the legal or illegal conduct of the parties, and upon the national domicil of the asserted proprietor, or the nature of the title by virtue of which he claims. These several insignia of hostility of character have already been fully considered in the chapter treating of that subject. In this connection it will be sufficient simply to refer to the leading principles, and to the decisions of the prize courts by which they have been established. In all cases of condemnation, whatever be the fact, by intendment of law the property is deemed enemy's property, and is *eo nomine* condemned.[3]

In the determination of the question of enemy or

[1] *The Diana*, 5 Rob., 60.

[2] *The Die Frie Damer*, 5 Rob., 357.

[3] *The Elsebe*, 5 Rob., 173; *The Nelly*, 1 Rob., 219; *The Alexander*, 8 Cranch, 169; *The Julia*, 8 Cranch, 181; *The Thomas Gibbons*, 8 Cranch, 421; *The St. Lawrence*, 1 Gall., 532; *The Joseph*, 1 Gall., 545.

neutral, it is settled, that where a person has his domicil, there is his country, whatever may be his country of birth or adoption.[1]

Question of national character.

In all cases, the master and crew are presumed to possess the national character of the vessel to which they are attached, during the time of their employment.[2]

As affected by domicil.

A person who remains in a belligerent country for several years, paying taxes, etc., though his design at first was a mere temporary sojourn, loses his national character.[3]

A neutral consul resident and trading in a belligerent country, is deemed a belligerent.[4]

The native character reverts at once, upon removal, and indeed as soon as one puts himself *in itinera* to his native country, *animo revertendi.*

As affected by trade.

A neutral merchant trading in the enemy's country as a privileged trader, is deemed an enemy, but not if he be engaged in the ordinary and accustomed trade of neutral merchants.[5]

The domicil of a commercial partnership is regulated by that of the persons composing.[6]

[1] *The Vigilantia*, 1 Rob., 1; *The Endraught*, 1 Rob., 19; *The Susan Christina*, 1 Rob., 237; *The Indian Chief*, 3 Rob., 23; *The President*, 5 Rob., 277; *The Neptunus*, 6 Rob., 403; *The Venus*, 9 Cranch., 253; *The Frances*, 1 Gall., 614; *McConnel* vs. *Hector*, 3 Bos. and Pul., 113.

[2] *The Endraught*, 1 Rob., 23; *The Bernou*, 1 Rob., 102; *The Frederick*, 5 Rob., 8; *The Ann*, 1 Dod., 221.

[3] *The Harmony*, 2 Rob., 232.

[4] *The Indian Chief*, 3 Rob., 22; *The Josephine*, 4 Rob., 25; *The Citto*, 3 Rob., 38; *La Virginie*, 5 Rob., 98; *The St. Lawrence*, 1 Gall., 457.

[5] *The Anna Catherina*, 4 Rob., 119; *The Rendsberg*, 4 Rob., 139.

[6] *The Viglantia*, 1 Rob., 1, 14, 19; *The Susa*, 2 Rob., 255; *The Indiana*, 3 Rob., 44; *The Portland*, 3 Rob., 44; *The Vriend-*

If a neutral merchant continue in a house of trade in the enemy's country after knowledge of the war, he is regarded as an enemy.[1]

The character of the traffic alone, is sometimes sufficient proof of hostile character, as, if a neutral be engaged in the enemy's navigation, it impresses a hostile character upon all his vessels which have no distinct national character, as well as the one so employed.[2]

As affected by the ship's flag or pass.

The flag or pass under which a ship is sailed is deemed conclusive evidence of its national character, though in general, the national character of a vessel depends on the domicil of the owner; but the owner is bound by the flag or pass which he sees fit to make use of, and when it happens to operate against him, he is not at liberty to deny the character which he assumed for his benefit. Such flag or pass so assumed does not bind *other parties* as against the owner. They are at liberty to prove the spurious character of the credentials, and the sifting of the evidence upon the hearing, by prize courts, is frequently directed to removing the mask and exposing the true character of the vessel in question.[3]

schap, 4 Rob., 166; *The Jonge Klassina*, 5 Rob., 297; *The Antonia Johanna*, 1 Wheat., 159; *The St. Jose Indiana*, 2 Gall., 268.

[1] *The Francis*, 1 Gallis., 618, and S. C., 8 Cranch, 348; *The Susa*, 2 Rob., 251, 255.

[2] *The Vriendschap*, 4 Rob., 166.

[3] *The Vigilantia*, 1 Rob., 1, 19, 26; *The Vrow Catherina*, 5 Rob., 161; *The Success*, 1 Dod., 131; *The Planter's Wench*, 5 Rob., 22; *The Magnus*, 1 Rob., 31; *The Fortuna*, 1 Dod., 87; *The Princessa*, 2 Rob., 49; *The Anna Catherina*, 4 Rob., 107; *The Commerce*, 1 Wheat., 382.

As affected by transfer of vessels during war.

The subject of the transfer of enemy's ships during war, has already been fully considered. The effect of such transfer becomes very often an important question at the hearing, and has frequently been discussed in prize courts. The student is referred to numerous additional authorities, illustrating the practice of the tribunals.[1]

And the transfer of goods *in transitu*.

So, too, has already been considered, the effect of a transfer of property in cargo, from an enemy to neutrals, while upon the voyage, or as it is called, *in transitu*. This is a fruitful question for discussion, and the determination of prize courts upon the hearing; and the reader is here referred to many decisions upon the subject both by the courts of England and the United States.[2]

Illegal trade as affecting proprietary interests.

It is sufficient after the consideration already given to the subject of illegal trade, or that which becomes illegal during war, to refer to the leading decisions of the prize courts upon that subject, as

[1] *The Phœnix*, 5 Rob., 20; *The Dree Gebroeders*, 4 Rob., 232; *Bentzon's Claim*, 9 Cranch, 191; *The Bernou*, 1 Rob., 102; *The Sechs Gedschmistem*, 4 Rob., 100; *The Argo*, 1 Rob., 158; *The Jenny*, 4 Rob., 31; *The Omnibus*, 6 Rob., 71; *The Minerva*, 6 Rob., 396; *The Packet de Bilboa*, 1 Rob.,133; *The Noyt Gedacht*, 2 Rob., 137, note *a*.

[2] *The Danckebaar Africaan*, 1 Rob., 107; *The Hatstelda*, 1 Rob., 114; *The Vrow Margaretha*, 1 Rob., 336; *The Jan Frederick*, 5 Rob., 128; *The Carl Walter*, 4 Rob., 207; *The Sally*, 3 Rob., 300, note *a*; *The Atlas*, 3 Rob., 299; *The Anna Catherina*, 4 Rob., 107; *The Rendsburg*, 4 Rob., 121; *The Jan Frederick*, 5 Rob., 128; *The Aurora*, 4 Rob., 218; *The Merrimack*, 8 Cranch 317; *The Marianna*, 6 Rob., 24; *The St. Jose Indiano*, 2 Gallis., 268, 1 Wheat., 208; *The Venus*, 8 Cranch, 253; *The Frances*, 1 Gall., 445, S. C., 8 Cranch, 344, 9 Cranch, 183; *The Mary and Susan*, 1 Wheat., 25; *The Josephine*, 4 Rob., 25.

affecting the important question to be determined at the hearing of proprietary interest.[1]

The effect of violation of blockade; of contraband trade; trade on enemy's coast, or with her colonies; and resistance to search.

Allied to the subject of illegal trade, prize courts are often required, at the hearing, to determine upon the evidence, whether there has been a violation or an attempted violation of a lawful blockade, an illegal traffic in contraband of war, a resistance to the right of search, an engagement in the coasting or colonial trade of the enemy, or unneutral conduct of any character. These several subjects have been fully reviewed. Some further authorities are here referred to, as well as others relating to the principles adopted by prize courts as to the important question, of the binding character of the acts of the master of the vessel, under various circumstances upon the owner of the vessel or the cargo.[2]

[2] *The Vigilantia*, 1 Rob., 1, 14; *The Hoop*, 1 Rob., 196; *Potts* vs. *Bell*, 8 T. R., 548; *The Rapid*, 8 Cranch, 155; S. C., 1 Gall., 295; *The Alexander*, 8 Cranch, 169; S. C., 1 Gallis, 532; *The Joseph*, 8 Cranch, 451; S. C., 1 Gallis, 545; *The Naiade*, 4 Rob., 251; *The Neptunus*, 6 Rob., 403; *The Danous*, 4 Rob., 255; *The Ann*, 1 Dod., 221; *The Abby*, 5 Rob., 251; *The Mary*, 1 Gallis., 620; S. C., 9 Cranch, 120; *The Lord Wellington*, 2 Gallis., 103; *The Julia*, 1 Gallis., 594; S. C., 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 8 Cranch, 444; S. C., 1 Wheat., 440; *The Ariadne*, 2 Wheat., 143; *The Atlas*, 3 Rob., 299; *The Sally*, 3 Rob., 300, and note *a*.

[2] *The Bordes Lust*, 5 Rob., 233, 1 Wheat., 389, note, 1 Wheat., 507; app. note 3; *The Vrow Judith*, 1 Rob., 150; *The Adonis*, 5 Rob., 256; *The Imina*, 3 Rob., 167; *The Mars*, 6 Rob., 79; *The Rosalie and Betty*, 2 Rob., 343; *The Alexander*, 4 Rob., 93; *The Elsebe*, 5 Rob., 173; *The Shepherdess*, 5 Rob., 262; *The Hiram*, 1 Wheat., 440; *The Dispatch*, 3 Rob., 279; *The Nereide*, 9 Cranch, 388; *The Fanny*, 1 Dod., 443; *The Vrow Judith*, 1 Rob., 150; *The St. Nicholas*, 1 Wheat., 417; *The Phœnix Ins. Co.* vs. *Pratt*, 2 Binney, 308; *Oswell* vs. *Vigne*, 15 East.,

The decree of condemnation and proceedings thereon.

When a sentence is pronounced in a prize court, upon a hearing in the first instance, whether it be of condemnation, or acquittal and restitution, it is, in all cases, an interlocutory decree, where any thing further remains to be done by the court, after deciding that the property is to be condemned or restored. And first, we will briefly review the subsequent proceedings upon an interlocutory decree of condemnation.

Who are captors and joint-captors entitled to share in distribution.

Condemnation being decreed, the next question for the prize court to determine is, *who are* the *captors* entitled to distribution.

We have already passed in review the settled principles upon which this question is to be decided by the court; in connection with captures made by commissioned or non-commissioned vessels—public, private or armed vessels—and as to joint-capture, and the principles upon which it is to be determined what is a joint-capture, and who are entitled to share in the distribution as joint-captors.

When a claim of joint capture to be filed, and how made and established.

It is not usual to file a claim of joint-capture before the interlocutory decree of condemnation; but if it be delayed until after a decree of distribution, it is too late—unless it should happen that an appeal has been taken from the decree, when, as matter of favor, it seems that a claim of joint-capture may be admitted.[1]

It is a settled rule of prize courts, that a claim of joint-capture must be made in the ordinary way, by a regular allegation of the facts and circum-

70; *The Neptunus*, 1 Rob., 170; *The Hoop*, 1 Rob., 196; *The Daankbaarheit*, 1 Dod., 183.

[1] *Duckworth* vs. *Tucker*, 2 Taunt., 7; *The Stella del Norte*, 5 Rob., 349; *Home* vs. *Camden*, 2 H. Bl., 533.

stances relied upon to entitle the claimants to share, to which allegations the captors are permitted to file counter-allegations, and the issue thus made, is to be sustained by proofs (the *onus* being upon the claimants to the rights of joint-captors) taken before the commissioners—being documentary, and the testimony of competent witnesses. No oral evidence is admitted, nor are *ex parte* affidavits allowed.[1] If, upon the allegations set forth in the claim filed, the court should be clearly satisfied that, as matter of law, the claim cannot be sustained, it will be rejected *in limine*, without inquiry into the facts.[2] To sustain a claim of joint-capture, proof of the admission of the fact of joint-capture by the capturing ship at the time of capture, is considered conclusive, unless invalidated; and a renunciation of the claim at the time by the asserted joint-captors, is alike conclusive. The evidence of witnesses on board the ship setting up the claim of joint-capture, unless corroborated by evidence *aliunde*, is never sufficient to sustain the claim.[3] In the case of joint-capture by public ships, the distributive portions are regulated generally by statute provisions.

Distributive proportions.

In the United States, this is done by the act of April 22d, 1800, ch. xxxiii., providing that the capturing ships shall share "according to the number of men and guns on board each ship in sight."

[1] *The Urania*, 5 Rob., 148; *La Virginie*, 5 Rob., 124; *The Union*, 1 Dod., 346; *The John*, 1 Dod., 363.

[2] *The Waaksamheid*, 3 Rob., 1.

[3] *The Fadrelandet*, 5 Rob., 120; *La Flore*, 5 Rob., 268; *The John*, 1 Dod., 363; *The San Jose*, 6 Rob., 244; *The William and Mary*, 4 Rob., 381.

No statute provisions for distribution exist in the case of joint-capture by privateers. By the general rule of the prize law, distribution in such case is to be in proportion to the relative strength, ascertained by the number of men on board each ship assisting in the capture.[1]

Sale and final distribution, when there is no claim for joint-capture and no appeal.

Upon a decree of condemnation, if no claim of joint-capture be interposed, and there be no appeal, the right rests in the captors; and in England, if the capture be by a private armed vessel, the captors are put in possession and permitted to make sale, and return an account into court. But in the United States, all sales of prize property, whether before or after decree, are made by the marshal, under the provisions of the act of Congress, of January 27th, 1813, chap. clv.

Decree of distribution.

To enable the court to render a final decree of distribution after the sale, it is requisite that the testimony should be taken by the commissioners, bearing upon the questions of superiority or inferiority of force, and of the officers and men entitled to share in their several grades, as shown by the muster-rolls, etc., and report the same to the court.

In the case of capture by public armed ships, the condemnation is always to the government, but the proceeds are distributed pursuant to statute provisions; and this provision, in the United States, is made by the act of April 23d, 1800, chap. xxxiii., and the prize act of June 26, 1812, chap. cvii., makes provision for the distribution of the proceeds where

[1] *Roberts* vs. *Hartley*, Doug., 311; *The Dispatch*, 2 Gall., 1; *Duckworth* vs. *Tucker*, 2 Taunt., 7; *The Twee Gesuster*, 2 Rob., 284; *Le Franc*, 2 Rob., 285.

the capture is made by duly commissioned privateers. In the appendix will be found the general provisions as to distribution. Non-commissioned persons are not, as a general rule, entitled to the benefit of prize; but exceptions have been made in favor of cases where great personal gallantry has been exhibited, and prize courts have, in some instances, awarded to such persons the entire proceeds.[1]

Decree necessary to distribution.

Distribution cannot be made without a decree, and such decree is upon the application of the parties or the mere motion of the court itself; but no one can claim a share, whose claim has not been admitted and supported in the prize court.[2] As to the circumstances under which a commander is or is not entitled to share, much discussion has been had; and all the authorities, both in England and the United States, upon this point, are collected in a decision of one of the United States courts, to which reference is made.[3]

Head-money.

By statute, both in England and the United States (the latter by the act of April 23d, 1800, chap. xxxiii., § 7), in addition to the prize proceeds, a bounty of twenty dollars for each person on board any ship of an enemy at the commencement of an action, which is sunk or destroyed by any ship of

[1] *The Haase*, 1 Rob., 286; *The Amor Parentum*, 1 Rob., 303; *The Joseph*, 1 Gall., 545.

[2] *Kean* vs. *Brig Gloucester*, 2 Dall., 36; *Penhallow* vs. *Doane*, 3 Dall., 54; *The Herkimer*, Stewart, 128; *Bingham* vs. *Cabot*, 3 Dall., 19.

[3] *Decatur* vs. *Chew*, 1 Gall., 506; *vide* also *The Diomede*, 1 Acton, 69, 239.

equal or inferior force, is granted for division among the officers and crew as prize money—and this is called *head-money*. The act of the Congress of the United States upon this subject, has received no judicial construction; but under the British act there have been several decisions, to which reference is made.[1]

Where no special statute intervenes, the decree of distribution is executed in the manner and by the persons prescribed by the court, whether clerk, marshal, prize agent, or commissioners, and the power of the court is summarily exercised to compel the accounting for and payment of prize proceeds by all persons in whose hands they have been intrusted or deposited. This may be by a proceeding either *in rem* or *in personam;* and the remedy is not limited to any stipulation taken in the cause, but the prize proceeds will be followed wheresoever they have gone, unless they have reached the hands of a *bona fide* purchaser without notice of the claim.[2]

As a general principle, the power of a prize court subsists after a general adjudication, to take any proceedings that may be requisite to the final and

[1] *Several Dutch Schugts*, 6 Rob., 48; *L'Alerte*, 6 Rob., 238; *The San Joseph*, 6 Rob., 331; *The Babillion*, Edw., 39; *La Clornide*, 1 Dod., 436; *L'Elise*, 1 Dod., 442; *The Matilda*, 1 Dod., 367.

[2] *Willis* vs. *Commissioners*, 4 T. R. 33; S. C., 5 East., 22; *Bingham* vs. *Cabot*, 3 Dall., 19; *Hill* vs. *Ross*, 3 Dall., 331; *Home* vs. *Camden*, 1 H. Bl., 474; *The Louis*, 5 Rob., 146; *The Pomona*, 1 Dod., 95; *The Polly*, 5 Rob., 147; *The Printz Henrick Von Prussen*, 6 Rob., 95; *The Exeter*, 1 Rob., 173; *The Princessa*, 2 Rob., 31.

definitive settlement of every thing respecting the prize.[1]

By act of Congress, of April, 1849, ch. ciii., § 8, the office of prize agent is abolished. It is understood that the defalcations and malfeasances of several of these officers who were intrusted with the proceeds of the prizes taken by the vessels of the navy in the Gulf of Mexico, during the war between the United States and Mexico induced this provision. The same act provides, that "All prize money from captures made by the vessels of the navy of the United States, *received by the marshal, who shall make sale of such prizes*, or the net proceeds thereof after paying therefrom all charges as provided by law, shall, within sixty days after such sale, be deposited in the treasury of the United States, to be disbursed therefrom as provided by law under the directions of the secretary of the navy."

This statute provision has received no judicial construction. It is apprehended that it was not its purpose to (nor does it in terms) supersede the necessity of a regular decree of distribution by the prize court. Such decree is frequently based upon the determination of the nice and sometimes complicated questions arising under claims of joint-capture, etc., which are the proper subjects for the adjudication of prize courts, and it could not have been intended to clothe the department of the navy with any of the functions of a judicial tribunal.

It was the obvious design of the law to avoid in

[1] The cases last cited.

the future, the complaints and annoyances which had resulted from a fraudulent diversion by prize agents, from the hands of the lawful distributees, of the funds intrusted to them for distribution.

Ordinarily, an execution of the decree of distribution, by officers of the court, acting under the direct authority of the court, and drawing the fund from the registry or depository of the court, would not only be much more convenient to the distributees, but it would save to them the additional expense resulting from the employment of an agent to represent them at the navy department.

In the great majority of cases, it is believed that the purpose of the law would be accomplished, without any departure from its provisions, by the exercise of that discretion with which the court as a prize court is unquestionably clothed, of directing a sale of the prize property to be made by the commissioners of prize, the proceeds to be by them received and deposited in the registry, or with the usual depository of the court, and by them disbursed therefrom, pursuant to the law and the provisions of the decree.

Decree of restitution on recapture.

If the documentary proofs and the examination *in preparatorio*, disclose a case of recapture merely, then two questions arise—first, whether the original belligerent owner is or not entitled to restitution, and if so entitled, what is the compensation to be paid by way of salvage?

When made, and when on payment of salvage.

We have already fully considered the principles and authorities upon which the right of the belligerent owner, whose ship having been captured by the enemy is recaptured, to have restitution made

to him, exists or is lost, in that chapter treating of the *jus postliminium.* And also the subject of the compensation in way of salvage, where the owner is entitled to a restitution.

Here, it is only necessary to refer to some few additional authorities, illustrative of the practice and proceedings of prize courts in such cases.[1]

Military salvage and its amount regulated by statute in the United States.

Discussions as to the general principles of law upon which salvage should be awarded to recaptors on a decree of restitution, and the measure of compensation, are superseded by the intervention of legislative provisions. This is the case in the United States. By act of Congress of March 3d, Chap. xiv., it is provided, that in cases of recapture of vessels or goods belonging to persons resident within or under the protection of the United States, *the same not having been condemned as prize, by competent authority before the recapture,* shall be restored on payment of salvage of *one eighth* of the value, if recaptured by a public ship, and *one sixth,* if recaptured by a private ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel belong to the government

[1] *The Santa Cruz,* 1 Rob., 50; *L'Actif,* Edw., 185; *The Ceylon,* 1 Dods., 105; *The Purssima Conception,* 6 Rob., 45; *The Victoria,* Edw., 97; *The Flad Oyen,* 1 Rob., 135; *The Cosmopolite,* 3 Rob., 333; *Hudson* vs. *Guestier,* 4 Cranch, 293, S. C., 6 Cranch, 281; *The Arabella and Madeira,* 2 Gallis., 368; *The Falcon,* 6 Rob., 194; *The Schooner Sophie,* 6 Rob., 138; *The Kiertighett,* 3 Rob., 96; *The Perseverance,* 2 Rob., 139; *The Nostra de Conceicas,* 5 Rob., 294; *The Countess of Lauderdale,* 4 Rob., 283.

and be *unarmed*, the salvage to be *one sixth* if recaptured by a private ship, and *one twelfth* if recaptured by a public ship; *if armed*, then the salvage to be one moiety if recaptured by a public ship. In respect to public armed ships, the statute provides for the same rate of salvage by the cargo as by the vessel; but in respect to private ships (as it is apprehended by inadvertence), the rate of salvage is made the same on the cargo whether the vessel be armed or unarmed.[1]

What constitutes a "setting forth as a vessel of war," within the meaning of this act, has received no judicial construction by the United States court, but the same provision, by a like clause in the British act, has received the interpretation of the English courts in the cases cited.[2]

Salvage, when allowed as a condition of restitution of recaptured property, is ascertained either by an appraisal of the property by appraisers duly appointed by the court, or by its sale, if the parties consent to such mode; and its distribution is upon decree, in like manner as the distribution of the proceeds of prize, upon condemnation and sale.

Question of damage, costs, and expenses, resulting from decree of restitution.

Where, upon the hearing, in the first instance, upon the papers and documents found on board the vessel, and the examination *in preparatorio* taken by the commissioners, it appears, that for any cause, in the judgment of the court, restitution should be decreed in favor of the claimants, the

[1] *The Adeline*, 9 Cranch, 244.

[2] *The Ceylon*, 1 Dod., 105; *The Horatio*, 6 Rob., 320; *The Nossa Senora del Rosario*, 3 Rob., 10.

question then arises whether upon such restitution, the damages, costs, and expenses are to be paid by the captors or the costs and expenses by the claimants. This rests entirely in the discretion of the court, and by the practice of prize courts has been made to depend upon the proof of probable cause of capture.

Wherever, upon the evidence taken in the first instance, the case is so doubtful that an order for further proof is made by the court, the costs and expenses are never allowed to the claimant.[1] Nor where the neutrality of the property does not appear either by the documents or the evidence.[2] Nor are such costs and expenses allowed in the case of a destruction or spoliation of papers, unless such destruction or spoliation has been occasioned by the misconduct of the captors themselves, as by *firing* under false colors.[3] Nor where the master or crew prevaricate on the examination.[4] Nor where any portion of the cargo is condemned.[5] Nor where the ship comes from a blockaded port.[6] Nor, if the ship be restored by consent, without reservation of the question of costs and expenses.[7] But in each one of these and similar cases, showing a probable or reasonable cause of capture, it is in the discretion of the court to allow the costs and

[1] *The Diana*, 5 Rob., 67; *The Einigheden*, 1 Rob., 323.

[2] *The Statira*, 2 Cranch, 102, note (*a*); *vide* Letter of Lord Stowell and Sir J. Nicholl in the Appendix.

[3] *The Peacock*, 4 Rob., 185.

[4] *The William*, 6 Rob., 316.

[5] *The Frederick Molke*, 1 Rob., 86; *The Betsy*, 1 Rob., 93; *The Vrow Judith*, 1 Rob., 150.

[6] The cases last cited.

[7] *The Maria Powlona*, 6 Rob., 236.

expenses to the captors, and order them to be paid by the claimants as a condition of restitution.[1] Wherever the captors are justified in their capture, their costs and expenses are decreed to them on restitution.[2] For this reason, they are allowed their costs and expenses, where the original destination of the vessel was to the blockaded port, although changed on hearing of the blockade.[3] Where the captured ship was sailing under false colors, whether the ship be an enemy's ship or not.[4] Where the nature of the cargo is ambiguous, as to its being contraband.[5] And in every case where farther proof is required by order of court.[6]

Wherever the expenses of the captors are allowed, such expenses are intended as are necessarily incurred as a consequence of the capture—such as agents' expenses, navigation expenses, pilots' expenses, harbor expenses, &c.—but not the expenses of insurance made by the captors, nor the expenses of transmitting a cargo from a colony to the mother country. The expenses of keeping the property, of its unloading and delivery, generally fall on the captors, unless where it is made a charge, or where it is specially apportioned, by order of the court.[7]

[1] *Vide* Letter of Lord Stowell and Sir J. Nicholl, Appendix.

[2] *The Imina*, 3 Rob., 167; *The Principe*, Edw., 70.

[3] *The Sarah*, 3 Rob., 330.

[4] *The Twende Broder*, 4 Rob., 33; *The Gute Gesetschaft*, 4 Rob., 94; *The Christina Maria*, 4 Rob., 166.

[5] The cases last cited, and *The Nostra Signora, &c.*, 6 Rob., 41.

[6] *The Frances*, 1 Gall., 445; *The Apollo*, 4 Rob., 158; *The Mary*, 9 Cranch, 126.

[7] *The Asa Grande*, Edw., 45; *The Catherine and Anna*, 4 Rob., 39; *The Narcissus*, 4 Rob., 17; *The Rendsbery*, 6 Rob. 142; *The Industrie*, 5 Rob., 88.

In the case of neutral vessels, the master's personal expenses and adventure are usually allowed, where his conduct has been fair and unimpeachable; but where the master or crew prevaricate, or where the ship has been engaged in an unlawful or fraudulent trade, their adventures are never restored.[1]

How damages, cost, and expenses ascertained.

Where the damages, costs and expenses are to be ascertained and determined, it is the practice of prize courts to refer it to the commissioners to hear the parties, examine their statements and accounts, and to report to the court in detail, such sum as they think equitably or legally due to the parties, and to accompany their report with the reasons upon which they base their allowance or disallowance of the respective items. Upon the return of this report, the parties are heard upon exceptions, substantially—though not formally, as in chancery—for the proceedings in prize courts are always as in summary and not plenary suits in the civil law.[2]

Execution of decree.

Where restitution is decreed, and the property remains specifically in the custody of the court, a warrant issues for its delivery to the claimant, and the expenses attending such delivery are to be borne by the captors, unless it be ordered otherwise.[3] If the property has been sold, and the proceeds are in court, an order issues for the delivery of such proceeds; but, if the proceeds are in the

[1] *The Calypso*, 2 Rob., 298; *The Anna Catherina*, 6 Rob., 10; *The Anna Catherina*, 4 Rob., 120; *The Christiansberg*, 6 Rob., 376.

[2] *The Lively*, 1 Gall., 315. [3] *The Rendsberg*, 6 Rob., 142

hands of an agent or the captors, a monition or an attachment is issued, to compel the bringing in of the proceeds. By the practice in the courts of the United States, if the prize property is once brought within the territorial jurisdiction of the court, either the property or its proceeds remains in court at the final decree, because it is always either in the custody of the commissioners or the marshal, who hold alike as officers of the court. The office of prize agent is abolished by statute, and the property is never, as in England, placed in the possession of the captors.

Where damages are decreed against the captors, such decree is either against them by name, or by a description of their relation to the ship; and where the decree is against the owners of a privateer generally, a monition may be issued against them personally, to compel the payment of the damages assessed. Such monition may also issue against the sureties on their bond, given on the granting of the letters of marque. A part-owner is liable for damages, where a decree for damages has been rendered, with that of restitution, even though his name does not appear in the registry as part-owner, and the representative of such part-owner is responsible for costs and damages decreed generally against the owners, although the part-owner of whom he is the representative, was not the doer of the wrong for which damage is decreed, and a release by the claimants of one part-owner, does not supersede the necessity of making him a party with the others to a suit for the proceeds.[1]

[1] *The Two Susannas*, 4 Rob. 278; *The Franklin*, 4 Rob., 404; *The St. Lawrence*, 2 Gall., 19; *The Jefferson*, 1 Rob., 325.

Order for farther proof. When made.

If, upon the hearing on the papers and preparatory examination, any doubt arises from any quarter, or upon any material point, the court may order farther proof, and is in no case precluded by the original evidence. Sometimes such an order will be made where a suspicion is created by the extrinsic evidence. An order for farther proof, however, is rarely made, unless there be something in the original evidence which suggests the propriety or the necessity of a farther prosecution of the inquiry. Where the case is quite clear in favor of the claimant's right to restitution, and is in no respect subject to any just suspicion, the disposition of prize courts is decidedly against allowing the captors to enter upon farther inquiry or to introduce extraneous evidence.[1]

Farther proof is in no case a matter of right to either party, but always rests in the sound discretion of the court. It is only when the parties have conducted themselves honestly and with good faith, and the errors or deficiencies which exist in the proof are fairly referable to ignorance or honest mistake, that the indulgence is granted of allowing new evidence.

Where the master does not swear to, or give account of the property; where the shipment, though sworn to be on neutral account, does not specify the person; where the ship has been purchased in the enemy's country; where any loss or material suppression of papers has occurred; where the papers are defective, and the conduct of the parties, the nature of the voyage, or the nature of the original

[1] *The Adriana*, 1 Rob., 313; *The Romeo*, 6 Rob., 351; *The Sarah*, 3 Rob., 330

evidence creates a reasonable doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions—in all such cases, farther proof becomes necessary, and will be permitted if the privilege of introducing it be not forfeited by the fraud or misconduct of the parties.[1]

In all cases where farther proof is necessary, and it is not allowed, a condemnation follows of course, in like manner as if the evidence had established hostile character.

When not allowed.

Farther proof is never allowed to claimants where fraudulent papers have been used, or where there has been a voluntary spoliation of papers, or a fraudulent covering or suppression of an enemy's interest, or where there is a false destination and false papers, or where the case is palpably incapable of fair explanation, or where there has been prevarication, or an attempt to impose spurious claims upon the court, or such a general want of good faith as to show that the parties cannot safely be trusted with an order for farther proof. And if, upon farther proof, none such is produced, or that which is produced is defective, or the parties decline to testify, or do so evasively, it is deemed conclusive against them, and condemnation follows; for it is a general rule of prize courts, that the *onus probandi* rests upon the claimants, and if they fail to sustain their allegations, condemnation ensues.[2]

[1] *The Jonge Pieter*, 4 Rob., 79; *The Welvaart*, 1 Rob., 122; *The Polly*, 2 Rob., 261; *The Juffrow Anna*, 1 Rob., 125; *The Graaf Bernstoff*, 3 Rob., 109; *The Eenrom*, 2 Rob., 1; *The Juffrow Elbrecht*, 1 Rob., 127; *The Rising Sun*, 2 Rob., 104.

[2] *The Nancy*, 3 Rob., 122; *The Mars*, 6 Rob., 79; *The Vrow Hermina*, 1 Rob., 163; *The Walsingham Packet*, 2 Rob., 77; *The*

Farther proof may be ordered in favor of the one party, and not the other, or in favor of both.

Evidence on order for farther proof.

When it is admitted on behalf of the captors, they may introduce papers taken on board another ship, if properly verified by affidavit, and they may invoke papers from another prize cause, and upon an order for farther proof, the affidavits of the captors themselves, as to facts within their own knowledge, are admissible in evidence.

It has been held in one case, not however reconcilable with the strict rule of prize courts, that the captors, to show the domicil of the claimants, may, without an order for farther proof, introduce at the first hearing, a deposition of the claimant, given in another cause.[1]

How farther proof taken.

Where farther proof is allowed the claimants, their own depositions, those of their clerks, and the correspondence between them and their agents, are admissible in evidence.[2]

In all cases of farther proof, the additional evidence, wherever practicable, should be taken before the prize commissioners, and reported to the court. Affidavits taken in foreign countries, before notaries public, whose attestations are perfectly verified, have been admitted in evidence, but the safer course is that which is adopted by the rule of

Rosalie and Betty, 2 Rob., 343; *The Countess of Lauderdale*, 4 Rob., 283.

[1] *The Romeo*, 6 Rob., 351; *The Maria*, 1 Rob., 340; *The Sarah*, 3 Rob., 330; *The Vriendschap*, 4 Rob., 166; *The Resolution*, 6 Rob., 13.

[2] *The Adelaide*, 3 Rob., 281; *The Sally*, 1 Gall., 401; *The Grotius*, 9 Cranch, 368; *The Haabat*, 6 Rob., 54; *The Glierktiget*, 6 Rob., 58; *The Charlotte Caroline*, 1 Dod., 192; *The Maria*, 1 Rob., 349.

the Supreme Court of the United States, that requires all such evidence abroad to be taken under a commission issued out of the court.

Such commissions, however, by a general rule of prize courts are never issued to be executed in the country of the enemy.[1]

Upon the return of the farther proof allowed, if any such be taken, the cause is again heard in its order, upon the original and supplemental proof, and not again opened.

Judicial orders *pendente lite.*

In the exercise of the duties of prize courts as the guardians of the public interest, they are frequently required to take some action with reference to the prize property, during the progress of the proceedings—such as the unlivery of the cargo, or its appraisal and sale, or the sale of the vessel.

Unlivery of cargo.

The unlivery of the cargo often becomes necessary to ascertain its nature and quality, or to preserve it from injury or pillage, or because the ship stands in a position relative to the claim, altogether distinct from the cargo. In these cases, and others in which it may seem alike proper, the court, on application, will order an unlivery of the cargo.[2]

In what manner effected.

Upon an order of unlivery of cargo, the court directs a commission to issue to the marshal or any competent person, to unlade the cargo, and to make a true and perfect inventory thereof; and at the

[1] *The London Packet*, 2 Wheat., 371; *The Magnus*, 1 Rob., 31; *The Diana*, 2 Gall., 93.

[2] *The Liverpool Packet*, 1 Gall., 513; *The Carl Walter*, 4 Rob., 207; *The Richmond*, 5 Rob., 325; *The Jonge Margaretha*, 1 Rob., 189; *The Oster Risoer*, 4 Rob., 199; *The Hoffnung*, 6 Rob., 231; *The Prosper*, Edw., 62.

same time a commission is directed to some competent persons, who are required, upon oath, to appraise the cargo according to its true value; and where the object is to ascertain the nature and quality of the cargo, these persons are required to return an inventory thereof, with a certificate of the particulars, names, descriptions, and assortments of goods, with their marks and numbers, and the nature, use, quantities, and qualities thereof.[1]

Removal of ship or cargo, or both.

The court may also, in the exercise of its general guardianship, order a removal of ship or cargo or both, to another place or port; and in such case, a commission of removal is issued, directed either to the marshal, or to such other person as the court may appoint.[2]

Expense of unlivery or removal, by whom borne.

The expenses incident to the unlivery of the cargo, or the removal of ship and cargo, being for the benefit of all parties, are usually borne by the prevailing party. If the captors apply for the unlivery, and the property is condemned, they bear the expense; but if restitution be decreed, the expense is generally made a charge upon the cargo—but this is always in the discretion of the court.[3]

Order of sale of the property, and how effected.

After the unlivery and appraisement, the court sometimes orders a sale of the property, whether ship or cargo, and this is done where they are in

[1] Marriott's Forms, 224.

[2] Marriott's Forms, 234; *The Rendsberg*, 6 Rob., 142; *The Sacra Familia*, 5 Rob., 360.

[3] *The Industrie*, 5 Rob., 88.

in a perishing condition, or liable to deterioration pending the process.[1]

This is done by a commission of appraisement and sale, issued to such competent persons as the court may appoint, directing them to choose appraisers, to appraise the same on oath, and thereafterward to expose the same to public sale, and bring the proceeds into the registry of the court. By the practice in the courts of the United States, a sale is sometimes ordered without a previous appraisement, but when appraised, the appraisers are always appointed by the court. In England, it is the practice of the court to allow the claimants to select one of the commissioners of appraisement and sale.[2]

Expense of sale, by whom defrayed.

The expense of this proceeding is, in the first instance, borne by the party applying for it, and ultimately as the court may decree. In the United States, the sale itself is in all cases made by the marshal, and such is usually the case in England, but the court may direct it to be made by any other person. The regular practice of the prize court is to have a previous inventory and appraisement; and obvious reasons of public policy to check fraud and fix responsibility on the officers of the court, require an adherence to that rule.

Delivery of the property on bail to the captors or claimants.

The court, in the exercise of its discretionary power, after a hearing in the first instance, orders a delivery of the property on bail, either to cap-

[1] *The St. Lawrence*, 1 Gall., 467; *The Frances*, 1 Gall., 451; *Jennings* vs. *Carson*, 4 Cranch, 2; *Stoddart* vs. *Read*, 2 Dall., 40; *The Copenhagen*, 3 Rob., 178; Marriott's Forms, 237, 318.

[2] *The Carl Walter*, 4 Rob., 207, 211; *The Rendsberg*, 6 Rob., 142.

tors or to the claimants, according to the circumstances as they are developed. We have seen in what cases the court will allow an application for such delivery to be made to the claimants, and in what cases to the captors.

The bail required in such cases, is a stipulation for the return of the property, or its full value, to abide the decree; and ordinarily, the court institutes an inquiry into the value, and the order is made pursuant thereto. The sureties in such stipulation are responsible only for the amount of their stipulation; but the principal is holden for the value of the property, though it exceed the sum named in the stipulation. The delivery is usually made on bail, at an appraised value; in which case, both principal and sureties are bound in that sum and no farther.[1]

But their liability cannot be reduced on an application to diminish it to the sum which the property actually produced at a subsequent sale.[2]

The expenses incident to a delivery on bail, are borne by the delivering party, unless the court otherwise direct, but usually the direction is, that the party who applies for the delivery on bail shall bear the expenses; and all subsequent expenses after its delivery are borne by the party receiving the property.[3]

Stipulations and liability thereon.

Stipulations to answer adjudication, given in a prize court, are not regarded as mere personal securities for the benefit of the parties, as such bonds

[1] *The Alligator*, 1 Gall., 145.

[2] *The Betsy*, 5 Rob., 295; and note (*a*), 296.

[3] The last case cited, and *The Rendsberg*, 6 Rob., 142.

are viewed in the common law courts. They are considered securities given to the court itself—pledges or substitutes for the thing, in all points fairly in adjudication before the court. They are not discharged by lapse of time, but may be enforced by the court at any time, and although the stipulation be given to the captors, the bail may be answerable in the admiralty to the government, if it should so result, from any circumstances, that the property is condemned to the government. But if, at the time of the capture and delivery on bail, the property was neutral, and by reason of the subsequent intervention of hostilities with the neutral power condemnation is made to the government, the stipulation would not in such case be enforced, because such an event was not in the contemplation of the parties when they entered into it. This is the English doctrine, but, although not passed upon by the courts of the United States, Judge Story seems to doubt its correctness: "For," says he, "the bail bond being a substitute for the property itself, there does not seem any very conclusive reason why it should not be subject to all the events which would have affected the property, if still in the custody of the court."

Appeal from decree.

On an appeal, the property follows the appeal into the appellate court.

Its effect on the possession or control of the prize property.

In the United States, when an appeal is made to the Circuit from the District Court, the property goes into the Circuit Court, and is no longer subject to the interlocutory orders of the District Court. It is not so, however, on an appeal from the Circuit Court to the Supreme Court of the United States,

for the decrees of the latter are always sent to the Circuit Court for execution, and therefore the property always remains in the latter court, notwithstanding the appeal.

FURTHER CONSIDERATION OF THE PRACTICE AND PROCEEDINGS OF PRIZE-COURTS, SUGGESTED BY THE ADJUDICATIONS UPON CAPTURES MADE DURING THE EXISTING WAR IN THE UNITED STATES.

[The belligerent right of the United States to interdict all commerce with the insurgents, by a blockade of the ports in their occupation, has been maintained by its naval forces, in superaddition to its other duties, with a noiseless but incessant and efficient activity, and the large number of naval captures that have been made, of property employed in the violation, or attempted violation of this belligerent right, have called into active exercise, for the past eighteen months, the prize jurisdiction of the federal courts of the country.

In the adjudications upon these captures, apart from the great questions of high political import which were considered and determined, many important subjects, connected with the practice and proceedings, in the administration of the law of maritime capture, have been authoritatively adjudged. A brief review of these discussions will make a proper and desirable supplement to the foregoing chapter.

THE DUTY OF CAPTORS.

The duty of captors.

The rule which declares it to be the duty of captors, as soon as possible after the completion of the capture, to send the captured property into some convenient port, for adjudication, like all general rules, admits of exceptions, in extreme cases, either of physical necessity, or of overruling moral influences.

As to the property captured.

Exceptions to the rule requiring it to be sent in for adjudication.

The exception arising out of physical necessity, is illustrated by the cases where the property captured is a long distance from any port of the captor's country, is in a perishing condition, and either the captors have no means of sending it in, or if they have, it is obvious that it would be of no value on its arrival. In such case, it may undoubtedly be sold, and the proceeds of the sale representing the property, will become thereafter the *res* on which the prize-court acts, in its adjudication.

Physical impossibility.

Exception arising from moral restraint.

So too, an overruling moral restraint, may present a sufficient ground of relaxation of the rule which requires adjudication upon the property itself.

This occurred in the case of *The British Empire*, captured on the coast of Florida, near St. Augustine, which was in possession of the naval forces of the Government of the United States.

The cargo of the vessel consisted mainly of articles of household consumption, and the public authorities of the town, presented a petition to the commander of the capturing vessel, representing in strong terms the famishing condition of the inhabitants of the town, for the want of many of the

articles contained in the cargo, that they possessed the means of paying for the same, and beseeching the commander, as an act of humanity, that he would order such portion of the cargo to be sold at auction, in the public mart of the place. This petition was complied with by the commander, the remainder of the cargo was sent to the port of New York for adjudication, and the proceedings in the court of that district were against the cargo sent in, and the proceeds of the cargo sold.

The learned judge, in his decree, while sustaining the action of the captors, under the peculiar circumstances of this case, nevertheless declares the necessity of a strict adherence to the rule, as founded in a positive neutral right, and therefore of a most careful scrutiny into such cases as are claimed to present justifiable cause for its infraction.

Excuse arising from the necessity of the captors.

The necessity of the captors for the use of the captured property, in whole or in part, constitutes another exception to the rule, which requires the property itself to be sent in for adjudication.

This necessity may be either that of the individual captors themselves, as where the captured property consists of provisions or supplies, actually required for the immediate use of the capturing vessel, or others with her in the service, or it may be more directly the necessity of the captors' government, as where the captured property consists of arms, ammunition, or of vessels, of the character required, for the use of the government, in the prosecution of the war.

Captured property taken for the use of the capturing vessel or the

In all such cases, the commander of the capturing vessel, or the Admiral of the fleet, must, of course, be the judge of the existence of the necessity; and,

government, must be appraised before appropriation.

in every such case, it is the imperative duty of the captors, prior to such appropriation, to cause the property which is to be taken, to be appraised by a competent naval board of survey and appraisement, appointed for that purpose.

This rule of appraisement not only rests upon the right of neutral claimants, but without such appraisement the individual captors themselves lose all benefit resulting from the capture by judicial decree.

The amount of appraisal deemed to be in the treasury.

No rule requiring its payment by the government, before final decree.

An appraisement of captured property, appropriated to the use of the government, in the prosecution of the war, whether before or after it has been sent in for adjudication, is considered by the courts as standing in the place of the property or its proceeds; and the amount of such appraisement is deemed to be in the treasury of the government, subject to a final decree of distribution or restitution, in like manner as if the property had been sold on interlocutory order, and the proceeds deposited in the treasury. Without such appraisement, the court is in possession of nothing upon which to base its proceedings for adjudication.

In some instances of the appropriation of captured property, consisting of arms, ammunition, &c., and of steamers suitable to be converted into vessels of war, the government of the United States has paid the amount of the appraisal to the order of the court, before adjudication, and upon the delivery of the property to the proper officer of the government. There is no reason for such a practice, nor is there any rule requiring it. The amount fixed by the appraisal, is deemed to be in the treasury, subject to the orders and decrees of the

court, from the date of the appropriation of the property.

The rules and practice, as above recited, are laid down in numerous cases of recent adjudication, in the United States District Court for the District of New York.[1]

Duty of captors as to the persons taken with the captured property.

The general rule in relation to the duty of captors toward the persons captured on board the vessels taken, is to send them in with the prize, as witnesses in the proceedings in adjudication.

General rule to send them in with the prize, as witnesses.

Except where they are very numerous, it is the safer rule to send all the captured persons into the port of adjudication; but in no case should the captors fail to send in the master and principal officers of the captured vessel. A failure to do this, can only be excused in a case of physical impossibility, not occasioned by any agency of the captors, and on the part of a private armed vessel would involve a forfeiture of the rights of prize.

Overpowering necessity the only excuse for a failure to comply with this rule.

In the case of *The Julia*, in the United States District Court for Massachusetts, the learned judge took occasion to comment upon a failure, without adequate excuse, to comply with this established rule of prize-courts, as follows:

"The prize law requires the captors to send in the master of the prize, as a witness. The failure to do this, unless for some overpowering necessity, is, in the case of neutral vessels, a serious fault. In the present case, the testimony of the master would be

[1] *The Memphis*, *The Stephen Hart*, *The Elizabeth*, *The Patrus*, *The Jos. H. Toon*, *The Ezilda*, *The J. W. Wilder*, *The Ellis* and *Armament*, and nine other vessels. *The Henry Lewis*, *The Anna*, *The Nostra Signora de Regla*, *The Magnolia*, *The Circassian*, *The Nassau*, *The Ella Warley*. MS. Decis. U. S. Dist. Ct., N. Y.

most material, yet he was not sent in. To account for this, I allowed the United States Attorney to take 'further proof,' and the deposition of the commander of the Cambridge, who made the capture, has been taken. From this deposition, it appears that it was as easy to send in the master as the seamen, yet the master was sent ashore at Fortress Monroe, and nothing has been heard of him since, while the men sent in as witnesses, knew little or nothing, and could not be expected to know much, about the actual ownership, papers, instructions and objects of the vessel and voyage.

"The commander justified his failure in this respect, by the language of the circular instructions sent to him, which are to send in 'two of the captured crew.' He certainly has not transgressed the letter of his instructions; but the instructions should have been more explicit. They should have required the sending in of the master in all cases, if possible. But whether the fault rests with the captor, the flag officer of the squadron, or the department, the rights of neutrals are the same.

"I do not feel authorized to condemn a vessel and cargo, sailing under British flag and documents, of British build, and on her papers, owned by British subjects, on such suspicions as appear in this case, where the captors have failed, without any excuse, to send in the master as a witness.

Captured persons not to be separated from, but to be sent in with the prize.

The captured persons sent in as witnesses, should not be separated from the captured property, unless this is deemed necessary for its safe transmission to the port of adjudication.

The violation of this rule, without apparent

necessity, has occasioned much embarrassment, inconvenience and delay in the recent adjudications, and the courts have animadverted upon such misfeasance of naval officers, with much severity.[1]

In numerous cases of capture, adjudicated in the United States Court in New York, it was made to appear that the persons belonging to the captured vessel, without exception, had escaped from her, prior to the capture, and could not afterward be procured.

Where crew of captured vessel escape, other inculpatory proof allowed.

In all such cases, the otherwise inflexible rule, which requires the testimony for condemnation to proceed, in the first instance, from the persons taken on board the prize, has been relaxed, and the captors have been permitted to supply inculpatory proofs from other sources.[2]

In some instances, naval captors during the existing war in the United States, have subjected persons captured on board vessels seized for a violation of the blockade, to such treatment as would be only justifiable toward prisoners of war. This must have have arisen from a singular misapprehension. The penalty, and the sole penalty, for this violation of the belligerent right, is the forfeiture of the property employed in it. The persons engaged in it cannot be lawfully treated as prisoners, nor can they be detained as prisoners, but only as witnesses.

Personal treatment of captured persons.

Detained as witnesses, not as prisoners of war.

Until they have given their testimony, they may

[1] Vide *The Shark*, *The Cheshire*, *Louisa Agnes*. MS. decis. U. S. Dist. Court, New York. *The Julia*. MS. decis. U. S. Dist. Court, Mass.

[2] Vide *The Actor*, *The Ellis*, and nine other vessels. *The A. J. View*, *The Delight*, *The Express*, *The Osceola*, *The Olive*, *The Capt. Speddon*. MS. decis. U. S. Dist. Court, New York.

and should be detained, and detained in such manner as to exclude the possibility of their being tampered with by interested parties. After they have testified, they should be forthwith discharged from custody.

A practice has prevailed in some, if not all the courts of the United States, of allowing and paying the persons sent in as witnesses, a compensation for their detention.

It is believed that no precedent can be found for this practice.

The Louisa Agnes. U. S. District Court, New York.

In the case of *The Louisa Agnes*, the learned judge of the Federal Court, in New York, commented at some length upon the duty of captors toward the persons captured, generally, as well as in the several particulars, which have been stated, and also took occasion to lay down the proper course to be pursued in all cases where redress is claimed by reason of alleged misfeasance, or malfeasance of naval officers.

The language of the learned judge upon this important subject, is so instructive in its lessons, and valuable in suggestion, that it would not be proper to omit it in this connection; but it is well to state, and justice toward the naval captors requires the statement, that the elaborate averments of ill treatment in this, as well as in numerous other cases, were wholly unsustained by any proof whatever, and seem to have been interposed more for the purpose of creating an unfounded prejudice, than in any expectation of supporting them by evidence.

"The affidavit of the master of the vessel, attached to the several claims in this case," says the learned

judge, "was insisted upon by each claimant as legal proof in his behalf.

The case of *The Louisa Agnes.* U. S. District Court, New York.

"It made allegations of misconduct committed by the capturing vessel upon the ship's company of the prize vessel, after her seizure; that the master and two of his crew were separated from the prize, and sent without her, to their serious inconvenience and wrong, to Baltimore, and thence by rail to New York, and that the writing-desk of the master was improperly opened on board the United States ship-of-war, while he was there detained, and that papers were abstracted from it by the captors, and that two of the seamen on the prize were placed in irons, and sent with her so ironed to New York by the captors. These allegations are not admitted by the libellants, or otherwise established by direct proof on the part of the claimants.

"This alleged misconduct has been urged as a conclusive defence to this suit, with the allegation that several causes, in addition to the present one, are still waiting the consideration of the court, in which that cause of defence is more flagrant, and strenuous appeals are addressed to the court to redress the wrongs and losses inflicted upon neutrals, by the course of conduct pursued during the present war by national vessels, in the assumed enforcement of the law of blockade. The court will indulge in no general denunciation or stigma of the supposed malfeasances of public vessels in the performance of their duties in relation to prizes, but will carefully examine the facts brought to its attention, and endeavor to uphold and enforce with strict justice, the legal rights and responsibilities of all parties implicated in prize proceedings brought before the court.

It is to be presumed that the officers and crews of the navy are disposed to conduct themselves in obedience to their instructions and to the rules of maritime law, in executing their war powers in making prizes; and the rules and practice of prize-courts fix their responsibilities, and the manner those are to be enforced, in case injuries are sustained from misconduct on their part, whether the capture is sanctioned and carried into effect by the court, or is declared nugatory and unjustifiable.

"The pleadings in a prize action involve directly no further question than that of prize. (*The Adelaide*, 9 Cranch, 284; *The Fortuna*, 1 Dods., 82, 83.) The parties on the trial of that issue are not legally required, if they may be permitted, to litigate any other point than that and the probable sequents to it. In a qualified sense, the consideration whether the unlawful acts of private captors after the seizure of property as prize, do not render the arrest of it void, may be regarded as characterizing vitally the capture, and thus become intrinsically admissible evidence in defence, against the conviction and forfeiture of the property; but yet that ground of defence need not be directly connected with the capture itself, or its liability to capture as prize, but may, and most probably will, spring out of facts wholly disconnected with either of those particulars.

"The general rule in respect to captures by public ships is, that the actual wrong-doer alone is responsible for any wrong done, or illegally committed on the prize, excepting acts done by members of the seizing vessel in obedience to the orders of their superiors. (*The Mentor*, 1 Rob., 151; *The Diligentia*, 1 Dods., 404; 2 Wheat., 13.) The lia-

bility of the officer is not constructive, and affixed to him solely on account of his superiority of command, but arises from his immediate command or authority in the transaction. (*The Eleanor*, 2 Wheat., 345.) Embezzlements of the cargo seized, or acts personally violent, or injuries perpetrated upon the captured crew, or improperly separating them from the prize-vessel, or not producing them for examination before the prize-court, or other torts injurious to the rights or health of the prisoners, may render the arrest of a vessel or cargo, as prize, defeasible, and also subject the tort feasors to damages therefor; but the law does not constitute those acts or omissions legal bars to the suit; and it is plain that the course of investigation into those matters, would not naturally be anticipated from the shape of a prize suit, nor could they be inquired into with that fulness befitting the gravity of the imputations, or their importance to the public service, or the rights of individuals, so well and satisfactorily, in summary and incidental proceedings, as in actions founded directly upon the injuries complained of.

"The practice of prize-courts supplies a course of procedure under claims for redress in cases of that description, which seems more proper to be pursued against public ships, when the consequences may also lead to other results than an award of pecuniary compensation to parties complaining of wrongs done them. A monition may be directed to those using the authority of the government, in seizing property at sea, compelling them to respond before the court, to parties aggrieved by their acts, for every wrongful use of the authority confided to

them; and that by pleas and allegations, the special grievances will be specifically charged and contested before the court, and the evidence pertinent to the contestation can thus be collated and laid before the court on both sides (*The Eleanor*, 2 Wheat., 345; *The Magnus*, 1 Rob., 27); merely interposing a statement of grievances by way of schedule attached to the claim of ownership and test oath, which enables a party to contest a libel of information in a prize suit, is not placing the controversy before the court in that authoritative shape, that parties are at once compellable to treat the allegations and suggestions as in litigation thereupon. It may well afford foundation for either party to appeal to the discretion of the court, to proceed and render justice in the matter summarily, in exercise of that pervading jurisdiction which envelopes prize proceedings; but when there is reasonble cause to look for a more thorough representation of the occurrences referred to, than will commonly be obtained from *ex parte* statements, given under impressions likely to be colored by the excitement of sudden capture, and the risks and inconveniences following it, I consider it the more reliable course of practice, to require the evidence to be furnished under pleas and allegations, when it is offered in bar of the rightfulness of a capture as prize, or as foundation for an award of compensation in damages, because of irregularities or culpabilities of captors who are in the public service, in making the seizure, or dealing with the prize property while in their possession.

"In *The Magnus*, Sir Wm. Scott says: 'The proof required was of the most solemn nature, by

plea and proof.' (1 Rob., 28.) The proceedings by plea and allegations, admonish the parties of the difficulties of their situation, and call for all the proofs their case can supply. (Wheat. on Capt., 284.)

"It is to be remarked in this case that no evidence has been given on the examination *in preparatorio*, or upon the papers of the vessel, showing any unlawful or irregular conduct of the captors in making the prize, or the subsequent treatment of her crew, or the property arrested. The affidavit of the master, referred to as a part of their claim by the claimants, is extra judicial, and not testimony in the cause; and if allowed by the court as notice to the libellants, of charges impeaching the legality of the capture, cannot avail as testimony in the suit on hearing. The like evidence was not permitted to have that effect in the case of the *Jane Campbell*. It was there only recognized as a basis for after summary proceedings, to establish the justness of the allegations under the implied reserve that it could not, *per se*, sustain a decree against the captors for torts.

"Two notes in the log-book, apparently entered by the prize-master after the arrest of the schooner, state that he placed the mate and steward in irons on taking command of the vessel, and in the afternoon took the irons off for the day, replacing them for the night, and next morning again removing them, alleging it to be discretionary with him to keep the men in irons day and night. No allusion to the occurrence is made by the men, on their examination; and in such posture of the transaction, the inference may be no stronger that the act was tortious and unjustifiable, and that it was an excusa-

ble precaution against menaced or well-suspected refractoriness of the prisoners. It is manifest, also, that separating the master and others of the crew, and not bringing them with the prize into port, and before the court, was not necessarily culpable of itself, and may have been justifiable from the condition of the vessel, or that of the crew.

"The government, on general principles, would not be debarred from vindicating their rights under the law of nations, against the criminal vessel and cargo, if it be proved that the captors, after making the prize, have, on their part, been also guilty of irregular and culpable conduct toward the prize property or crew.

"In that respect, the court will sedulously administer the same measure of relief to injured parties against captors acting in the public service, as are supplied by the law in relation to private cruisers. Yet there may be reasonably observed differences in the method of enforcing it, because, in the case of public vessels, the ship's company are subject to the direction and authority of officers outside of those commanding the particular vessel engaged in the capture, and may be entitled by law to exemptions from personal responsibility, which could not be set up by the voluntary wrongdoer. Besides, the act for the better government of the navy, subjects any person in the navy, for misconduct in relation to prize property, to forfeiture of his share of the capture, and such further punishment as the prize-court shall impose. (2 Stats. at Large, 46, § 8.) In such cases, it seems to me there is a special fitness in requiring that the right of reclamation of damages from captors in

captures made by public vessels, should be pursued by the parties averring the grievance and tort committed upon them, by plea and proof, which admit of counter allegations, and full evidence under them. This will be the course of practice to be hereafter followed in like cases, unless specially ordered by the court."

By the 8th section of the act of Congress, of July 17, 1862, entitled "An act for the better government of the navy of the United States," the maltreatment by any person in the navy, of persons taken on board a prize, is made punishable by court-martial.

The inculpatory proofs in a case of maritime capture, must, as has been seen, proceed, in the first instance, from the testimony of the captured persons, and the papers of the vessel found on board. It is therefore the duty of the captors, in all cases, to send in such papers and documents, books, charts, &c., in their precise condition as at the time of capture, so that the prize-master, in delivering them to the commissioners, may identify them as such, in his affidavit made to that end.

Duty of captors as to vessel's papers found on board at the time of capture.

But there may be other papers on board the vessel which are not, in any sense, the papers of the vessel, and which may contain important criminating evidence.

As to other papers, not being the vessel's papers.

Such papers may consist of letters, under private or official seal, inclosed in a mail bag, or parcels of like description.

In explanation of the duty of captors with regard to such papers, as well as their duty in the exercise of the right of visitation and search, the hon-

orable Secretary of the Navy of the United States issued a circular of instructions to naval commanders, on the 18th day of August, 1862. Its terms declare not only the special and particular, but the general duties of naval captors in these respects. It becomes, therefore, valuable for preservation and reference, in this connection.

Circular of instructions in this respect to naval commanders, from the United States Secretary of the Navy.

"NAVY DEPARTMENT, *Aug.* 18, 1862.

"SIR: Some recent occurrences in the capture of vessels, and matters pertaining to the blockade, render it necessary that there should be a recapitulation of the instructions heretofore from time to time given, and also of the restrictions and precautions to be observed by our squadrons and cruisers. It is essential, in the remarkable contest now waging, that we should exercise great forbearance with great firmness, and manifest to the world that it is the intention of our government, while asserting and maintaining our own rights, to respect and scrupulously regard the rights of others. It is in this view that the following instructions are explicitly given:

"*First:* That you will exercise constant vigilance to prevent supplies of arms, munitions and contraband of war from being conveyed to the insurgents; but that under no circumstance will you seize any vessel within the waters of a friendly nation.

"*Second:* That, while diligently exercising the right of visitation on all suspected vessels, you are in no case authorized to chase and fire at a foreign vessel without showing your colors, and giving her the customary preliminary notice of a desire to speak and visit her.

Third: That when that visit is made, the vessel is not then to be seized without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transhipment, or otherwise violating the blockade; and that if, after visitation and search, it shall appear to your satisfaction that she is in good faith and without contraband, actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she cannot be lawfully seized.

Fourth: That to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried, or parcels under official seals, you will, in the words of the law, 'preserve all the papers and writings found on board, and transmit the whole of the originals, unmutilated, to the judge of the district to which such prize is ordered to proceed.' But official seals, or locks, or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read, by any naval authorities; but all bags or other things covering such parcels, and duly sealed or fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband, or important as evidence concerning the character of a captured vessel, will be remitted to the prize-court, or to the Secretary of State at Washington, or such sealed

bags or parcels may be at once forwarded to this department, to the end that the proper authorities of the foreign government may receive the same without delay.

"You are specially informed that the fact that a suspicious vessel has been indicated to you as cruising in any limit which has been prescribed by the department, does not in any way authorize you to depart from the practice of the rules of visitation, search, and capture, prescribed by the law of nations.

"Very respectfully,

"GIDEON WELLES, *Secretary of the Navy*."

OF THE DUTIES OF PRIZE COMMISSIONERS.

The duties of United States prize commissioners prior to recent legislation.

THE duties of the prize commissioners with reference to the captured property, and the proceedings in adjudication, have been held by the prize-courts both of Great Britain and of the United States, until the passage of an act of Congress, of March 25th, 1862, "for the better administration of the law of prize," to be all comprised under the three following heads:

1st. Receiving the prize property from the captors, placing their seals thereon, and safely keeping the same until process is issued, under which their possession is superseded by that of the marshal.

2d. Receiving from the prize master the papers, documents, charts, and books of every description, found on board the prize; causing their identification by the prize master, in an affidavit to be made by him for that purpose marking each paper to secure the identification, and depositing the same

with the prize master's affidavit of identity, enveloped, and sealed with their seals, in the registry of the court.

3d. Taking the testimony of each witness produced to them by the captors, for examination, separately, and apart from their counsel, and in answer to the standing interrogatories, *in preparatorio*, and after complying with the required formalities depositing the same enveloped, and sealed with their seals, in the registry of the court.

By the act of Congress referred to, a single further duty is devolved upon prize commissioners, in the following words:

Additional duties imposed by act of Congress.

"It shall be the further duty of said prize commissioners, at the time of taking such possession, and from time to time, pending the adjudication, to examine into the condition of said property, and report to the court if the same, or any part thereof, be perishing, or perishable, or deteriorating in value."

As the prize property was to be under the seal of the commissioners, pending the adjudication, and, of course, could not be examined without the removal of their seal, it was, no doubt, thought proper, by the framers of the law, that it should be occasionally examined by them, and its condition, if perishing, made known to the court.

Construction of the act by United States Circuit Court for the Second Circuit.

But these words have been held to impose upon the commissioners many onerous, and highly responsible duties.

These additional duties devolving upon the prize commissioners, as held by the distinguished judge of the Circuit Court of the United States, for the second Judicial Circuit, in the case of *The Hiawa-*

ha, on appeal from a decree of condemnation, rendered by the District Court for the Southern District of New York, are as follows:

First—That where they find the property perishing, they must make a motion for its sale, and notify the district attorney, and the proctor for the claimants, of the motion to be made.

Second—That their power is joint, and that the concurrence of both is necessary to the validity of their acts.

Third—That the power to report to the court as to the condition of the property as they examined the same, from time to time during the litigation, makes them the representatives of all parties in interest; and therefore, although the act requires the sale of the property to be made by the marshal, it must be made under the direction and superintendence of the prize commissioners.

Fourth—That they must attend the sale of captured property, as the representatives of all parties in interest, and see that the property is not sacrificed thereat.

Fifth—That where a cargo is to be discharged and appraised before sale, this is to be done under the superintendence of the prize commissioners. That they must take an accurate list of each item of the cargo, when it is discharged, with a view to appraisal. That they must separately appraise, and cause to be separately sold, the separate parcels of each bill of lading.

It may be, and on many accounts it undoubtedly is, very desirable, that the prize commissioners should be clothed with this power, and be charged with these duties; but if it were the intention of

Congress that such duties should be devolved upon these officers, it is to be regretted that other language was not employed to express that intention.

Witnesses to be examined without the presence of counsel.

By the terms of the act of Congress in question, it is the duty of the prize commissioners to examine the several witnesses upon the standing interrogatories, not only apart from each other, but "unattended by counsel."

This is believed to have always been the rule of the English prize-courts; but in consequence of some looseness of practice in this respect, arising out of a question made as to the true construction of the rule, it was probably thought advisable that a provision so salutary, should receive the sanction of legislation.

THE PRIZE LIBEL AND CLAIM.

The rule as to the general character of the averments of the libel and the claim sustained by the recent decisions.

The doctrine that the libel in prize should contain no special averments of the grounds on which condemnation is claimed, but be altogether general in its allegations, and that the claim interposed, must consist exclusively of a simple statement of ownership, and a general denial of the validity of the capture—was briefly stated in the previous edition of this work.

In the case of *The Revere*, decided in the Massachusetts District Court, and in the case of *Empress*, as well as in a large number of other cases decided in the District Court of New York, in which the claimants were British subjects—the libels filed pursuant to this rule, were objected to by claimants'

counsel as insufficient, in not setting forth special cause for capture or condemnation—and the claimants insisted upon their right to file elaborate answers, as in instance causes, in addition to the claim of ownership.

The doctrine, however, as laid down, was, upon elaborate argument, affirmed in every case.

In the case of *The Revere*, the learned judge says: "The libel need not set forth specifically the grounds on which condemnation is sought. General allegations are sufficient. The vessel is to be condemned if at all, on any grounds that the examination may disclose. Prize proceedings are not subject to the same rules of pleading as suits on the instance side of the court. This hearing is upon the preparatory evidence, as it is called, that is, upon the papers found on board the vessel, and the answers of her officers and crew upon the standing interrogatories. The claimants are not entitled to further proof, nor are the captors, unless in special and peculiar cases, upon motion and cause shown. The answer, in the nature of pleading, is therefore irregular; and so much of the document called a test affidavit as goes beyond the facts of the claim, I shall not regard as evidence."

DELIVERY TO CLAIMANTS ON BAIL.

Delivery of captured property to claimants on bail, before a hearing, subversive of the policy and purpose of maritime capture.

The delivery of captured property to claimants on bail, before a hearing, is so utterly subversive of the policy of the law of maritime capture, that the designation of the practice by Mr. Justice Story as a "gross irregularity," is one of mild reproof.

The naval power of the nation is employed in the capture of the property of its enemy, or that which is being used in aid of its enemy, upon the high seas. The purpose of such capture is the sole basis of the belligerent right, namely, to compel the enemy to peaceful submission by destroying his means of aggression or resistance. Oftentimes at great hazard, always at no inconsiderable expense, the captured property is sent into a port of the captor's country for adjudication. That it should be then, by judicial fiat, forthwith surrendered to the claimant on credit, is a defeat of the manifest design of the law, so entirely obvious, that it seems hardly credible that such a practice should prevail, or be adopted by any court, which does not at the same time ignore the existence of the belligerent right. But that a court of appellate jurisdiction in prize, should entertain a motion for the delivery of captured property to a claimant, after a decree of condemnation of the property, on the first hearing, would seem still more extraordinary.

Reasons for the rule of non-delivery still more cogent after hearing and condemnation.

One reason among many, given by the courts for the inflexible rule of the non-delivery of captured property to claimants on bail, before a hearing, is, that it cannot then be judicially known that the claimants are not enemies or acting for enemies.

It would, indeed, be strange if the rule should be

permitted to bend, when it has become known, by the violent presumption resulting from a solemn decree, after a hearing, that the property is either that of an enemy or of one acting for an enemy.

The inveterate practice of fifty years of peace in the Courts of Admiralty of the United States, of the delivery to claimants, on bail, of property seized for the violation of a municipal regulation, may account for the difficulty, both on the part of courts and practitioners, to realize at once the necessity of a total departure from this practice.

Indeed, it appeared to be regarded so pertinaciously as a matter of course, that claimants of property captured as prize, were as much entitled to have it delivered to them on bail, after appraisement, as claimants of property seized for the violation of a revenue law, or the laws for the suppression of the slave trade, that the Congress of the United States, in "an act for the better administration of the law of prize," passed on the 25th of March, 1862, provided for the sale of captured property, and the deposit of the proceeds in the registry of the prize-court, when it was perishable or in a perishing condition, in terms adapted to preclude any other disposition of such property before a final condemnation.

To secure this beyond a doubt, and to place the policy of maritime capture beyond the possibility of defeat, in this respect, by judicial construction, it would be wise in future legislation, to provide in express terms, that the disposition of perishing captured property, by sale, was designed to interfere with and to exclude its delivery on bail, and and other mode of disposition of the subject-matter of litigation pending the suit.

In the former edition of this work the established rule of non-delivery of captured property to claimants, on bail, was briefly stated, and the authorities cited by which the rule was established.

The doctrine of non-delivery fully sustained by decision of the United States District Court of Massachusetts.

In the case of *The Amy Warwick, on the claim of Phipps*, after the court had allowed the claimants to introduce further proof of property, a motion was made for the delivery to them of the property which they claimed, on appraisement and bail. The motion was opposed by the captors, who, on their part, moved for a sale of the property. In denying the motion for the delivery of the property on bail, and ordering instead, its sale, the learned judge thus aggregates the objections to the former practice, which he said had "always weighed with prize-courts:" "Before the hearing *in preparatorio*, it cannot well be judicially known that the claimants are not enemies, or acting for enemies; or that if not so, that they have such absolute title in the property as to be the persons to whom it should be restored, in case it should be decided to be no prize, and the captured property may itself be evidence. If, on the hearing, their claim remain in doubt on any of these points, why should they take the property rather than the captors? The court must be careful to deliver the property to none but actual owners, and persons who would not pass it to an enemy for whom they might act. There are other difficulties attending this course in the general. It throws on the captors the risk of the sufficiency of the bondsmen at the time, and their continued solvency until a final decision in the appellate court. It gives the claimants the choice of abiding or not abiding by the appraisement. If it is low, they will adopt it, and

Reasons for the sale stated in the case of *The Amy Warwick.*

give bonds, and so make a profit at the expense of the captors. If the appraisement is to the full value, they may decline to give the bonds. And there is always danger of under valuation, not only by fraud, and by the pressure of interests in the trade, but from erroneous principles of estimation. A public sale is the best and fairest proof of value, and the funds in the registry, to be delivered to the parties finally decided to be entitled to it, is the most satisfactory course, where there are no special circumstances."

Reasons for the rule of non-delivery on bail applicable to non-delivery on payment of appraised value.

It will be seen that all of these objections to the delivery of captured property to claimants, on bail, with the single exception of that which refers to the sufficiency and continued solvency of the stipulators, are alike applicable to the delivery of such property to claimants, upon payment into court of its appraised value—a practice no less calculated to defeat the great end of maritime capture.

THE CAPTORS ENTITLED AS DISTRIBUTEES. HOW DETERMINED.

New rules of distribution by recent act of Congress.

By the third section of the Act of Congress of July 17th, 1862, material alterations are effected in the mode of distribution of the moiety of the proceeds of maritime captures, accruing to naval captors.

By the provisions of this section, after deducting one-twentieth part of the prize money awarded to the capturing vessel, for the commander of the fleet or squadron, to which she is attached, if thus attached, and two-twentieths for the commander of the capturing vessel, if attached to a squadron, and

three-twentieths if the ship was acting independently of any superior officer, the residue of the prize money awarded to the capturing vessel is to be "distributed and apportioned among all others doing duty on board, and borne upon the books, according to their respective rates of pay in the service."

Vessels within signal distance entitled to share.

By the fourth subdivision of the same section, vessels of the navy "within signal distance of another making a prize," are entitled to share in the prize; and it would seem, by the provisions of this subdivision, that in the event of two or more vessels in the navy being entitled, as joint-captors, after deducting the flag-officer's one-twentieth, the entire residue of the captors' moiety is to be distributed among all the officers and men of the ships entitled, including the commanders, according to the rates of pay of all on board, who are borne upon the books.

Forfeiture of commander's share of prize money, for certain neglect.

By the fifth section of this act, forfeiture of the share of prize money to which a commander might be entitled as the result of a capture, is declared to be the consequence of a neglect to perform the duties therein prescribed, as follows:

"That the commanding officer of every vessel, or the senior officer of all vessels of the navy, which shall capture or seize upon any vessel or vessels, as prize, shall carefully preserve all papers and writings found on board, and transmit the whole of the originals, unmutilated, to the judge of the district to which such prize is ordered to proceed, with the necessary witnesses, and a report of the circumstances attending the capture, stating the names of vessels claiming a share thereof; and the

commanding officer of every vessel in the navy entitled to or claiming an award of prize money, shall, as early as practicable, after the capture, transmit to the navy department a complete list of the officers and men of his vessel, entitled to share, inserting thereon the quality of every person rating."

By the seventh section of the same act, forfeiture of prize money is declared to be also a portion of the penalty upon any person in the navy who shall "take out of any prize, or vessel seized as prize, any money, plate, goods, or any part of her equipment, before the same shall be adjudged lawful prize by a competent court, unless it be for the better preservation thereof, or absolutely necessary for the use of any of the vessels or armed forces of the United States."

Armed vessels in government service entitled as if in the navy.

By the sixth section of the act, "armed vessels in the service of the United States, which shall make a capture," or be within signal distance of a vessel of the navy, when making a capture, are declared to be "entitled to an award of prize money, in the same manner as if such vessels belonged to the navy."

Merchant vessels making captures not entitled in strict law—but in practice a share is awarded them commensurate with the meritorious character of the service.

Merchant vessels making a capture are not entitled, by *strict law*, to any share whatever of the proceeds of the captured property; but it has not been the practice to exact in such cases the legal right of the government to the entire proceeds, but, on the contrary, to award the merchant captors a portion of the proceeds, and sometimes even the whole, according to the circumstances of the case, and the meritorious character of the service performed.

By this practice it is understood that the concession of the strict legal rights of the government is optional with the navy department, and the courts in such cases, act upon such concession, in their decrees of distribution.

Such was the recent case of *The Agnes H. Ward*, captured by the merchant California steamer, *Northern Light*, and adjudicated in the District Court of the United States for the District of New York.

A lieutenant in the navy of the United States happened to be on board the merchant steamer as passenger, and took part in the capture. Upon the concessions of the secretary of the navy, the court decreed three twentieths of the captor's moiety to the lieutenant on board, as if in command of a single ship, acting independently, and the residue of the captor's moiety to the merchant vessel, to be distributed in designated proportions among owners, officers, and men.

Who are the lawful distributees of prize money as captors or joint captors, is settled by the final decree of distribution of the prize-court.

Decree of distribution. How required to be rendered by the act of March 25th, 1862.

This decree of distribution is not, as it was prior to the Act of Congress of March 25th, 1862, a decree of detailed distribution setting forth not only the vessels entitled, but the individuals, and the amount to be paid to each.

By the provisions of that act, the decree of final distribution, now only determines what ships are entitled, and whether the captured vessel was of superior, equal, or inferior force to the capturing vessel.

This decree is to be based upon the report of

And how and where the same is to be executed.

the prize commissioners to the court, setting forth the evidence produced before them upon these points by the government and the captors.

Upon the basis of this decree, the amount to which each person is entitled as captor, is then ascertained at the navy department, where the prize lists are required by law to be sent by commanders, where the respective rates of pay of all on board the vessels entitled, is known, and where the prize money is to be paid under the direction of the secretary.

COSTS AND DISBURSEMENTS IN PRIZE PROCEEDINGS.

Character of the costs and disbursements.

THE sending in, safe keeping and adjudication of captured property, necessarily involve large expenditures. These consist of pilotage, towage, wharfage, insurance, the expenses of an unlivery of cargo, where such unlivery is necessary to its preservation, storage, and the numerous expenses incident to the adjudication, appraisement and sale.

How to be liquidated.

These costs and expenses constitute a charge upon the proceeds of the property, if the same should be condemned and sold. But many of these expenses are of such a nature as to require immediate disbursement, and the liquidation of none of them should be postponed to the termination of a protracted litigation, especially if the litigation be protracted by appeals from final decrees of condemnation.

To provide against such delays, which have occasioned very great embarrassment in the recent judi-

cial proceedings upon maritime captures in the courts of the United States, the obviously proper course is that pursued in the British Admiralty, namely, the provision of a fund by the government, for the purpose of prompt liquidation of these expenses, under such regulation as shall insure its proper application, as an advance by the *dominus litis*, upon the security of the property in his possession.

Embarrassments resulting from the want of an appropriation to pay the necessary expenses of adjudication.

By the provisions of the act of Congress of March 25th, 1862, it was attempted to effect the payment of the expenses referred to out of the proceeds of the sale of captured property, without further delay than that requisite for its condemnation; and in view of the ordinary and requisite celerity in prize proceedings, it was thought that a provision for payment at such time, might supersede the necessity of providing a special fund, and tend to relieve the embarrassments arising from the delay.

Attempted remedy by statute provision.

The second section of the act referred to, accordingly provides that the several charges and expenses enumerated, "having been audited and allowed by the court, shall, in the event of a decree of condemnation, be paid out of the proceeds of any sale of the property, final or interlocutory, in the custody of the court."

An appeal from a decree of condemnation in a prize cause, should not, it was urged, as in England it does not, stay the execution of the decree, except so far as to postpone the final distribution of the net proceeds of the property.

Reasons for such construction of the statute as shall secure the remedy.

In the case of a capture by a private armed vessel, the captors are entitled to the possession of the property upon security, after a condemnation, not-

withstanding an appeal; and where the capture is made by a public ship, a sale of the property, and deposit of the proceeds, as required by law, should, in all cases, follow directly upon a decree of condemnation, even though an appeal be interposed. It would be intolerable, it was said, to allow a claimant of captured property, after it has been condemned on the proofs and argument, by the intervention of an appeal which, in ninety-nine cases out of every hundred, is for delay simply, and upon his giving an appeal-bond for the paltry sum of two hundred and fifty dollars, as required by law, to tie up property, perhaps to the value of half a million, which not being perishable, cannot be sold, during the months, and it may be years, of the pendency of the several appeals, the expenses upon which, for safe custody and insurance, exceed the amount of his appeal bonds, during each week of the litigation—and which expenses he is in no event bound to pay—but which must be deducted from the proceeds of the property, thus reducing, by thousands, the amount subject to the final decree of distribution.

Such a practice, it was said, would seem even more intolerable and unjust, when it is considered that it is the established rule of prize-courts, that a decree of condemnation, in the first instance, being conclusive evidence of the highest character, of the probable and justifiable cause of capture, subjects the claimants to the payment of all the costs and expenses, even although such decree should be reversed on appeal.

Indeed, the captured property is invariably charged with the costs and expenses, by the decisions of prize-courts, wherever probable cause for

the capture existed; although restitution should be decreed, at the hearing, on the proofs, in the first instance.

It was therefore considered that the legislative enactment, providing for the payment of the costs and expenses out of the proceeds of a sale of the property, "in the event of its condemnation," would not only secure their payment without great delay, but would be manifestly just, and in accordance with the theory of prize proceedings, and the practice of prize-courts.

This statute has, however, received a judicial construction at variance from all this.

The statute otherwise construed by the Circuit Court of the United States in the Second Circuit in the cases of *The Sarah Starr* and *The Aigburth*.

The Sarah Starr and *The Aigburth*, having been condemned upon the hearing in the first instance, by the decrees of the District Court of the United States for the Southern District of New York, the several claimants in each case appealed from the decrees to the United States Circuit Court.

The cargoes had been sold on interlocutory order, and the proceeds deposited in court. The claimants and appellants then moved the Circuit Court for an order for the appraisement of the vessels, and their delivery to them, upon executing a bond for their appraised value.

The marshal then intervened, and prayed for an order for the payment of the expenses and disbursements out of the proceeds in court in the several causes, and which he had individually disbursed; consisting of pilotage, towage, wharfage, keeper's fees, &c.

After reciting the provisions of the act of March, 1862, the learned judge says:

"It will be seen, from the above provisions, that

the claimant is not responsible for the costs and expenses attending the seizure, detention and safe custody of the vessel seized by the government, unless followed by a decree of condemnation, or restitution on payment of the costs.

"The government is the libellant, instituting proceedings against the vessel, and, like any other party instituting a suit, is responsible for the expenses incurred in the progress of the litigation, accompanied with the right of reimbursement in the event of success, namely, the condemnation of the vessel, &c.

"The claimant acts on the defensive, and is not subject to any portion of the costs and expenses incurred by the proceeding of the libellant, except his own, in the progress of the defense, till adjudged against him *by the court in the final adjudication.*

"It is true that these costs and expenses are a charge upon the property seized, whether vessel or cargo, and which remains in the custody of the law, or its proceeds, in case of an interlocutory sale, or the bond, as representing the property, in case it is bonded, as a security for the reimbursement of these costs and expenses; and this charge upon the *res* continues until the final adjudication of the case. If favorable to the libellant, they are paid out of the proceeds; if not, they are exempt, and the property, or proceeds, restored to the claimants.

"Applying these principles to the case before us, it is quite clear that the marshal's bill presented, which includes charges for his own services, for wharfage, towage, &c., cannot be allowed. He must look to the government, the libellant, for

these expenses, or postpone his claim to the final adjudication, when, if against the claimant, he may be paid out of the proceeds, otherwise not."

By the language of this opinion, it is apparent that the learned court regards a proceeding in a prize-court, in adjudication upon a maritime capture, as analogous to an instance-suit in Admiralty, in this, that neither the capture, nor the decree of condemnation after hearing, upon the proofs, furnish any presumption against the claimant; and further, that the framers of the statute, in providing for the payment of the expenses out of the proceeds of the property "in the event of condemnation," intended a decree of condemnation, affirmed by the Circuit Court, and again affirmed by the Supreme Court of the United States.

If the intention of the act was such as it was supposed to be prior to this decision, the effect of this authoritative construction was to render it nugatory; and thus the question of the payment of the costs and disbursements incident to adjudications in prize, remained in the like situation as before the statute, and continued to impose serious and increasing embarrassments upon the respective officers charged with the administration of the law.

Incongruous legislation rendered inoperative a subsequent attempt to provide a remedy.

An attempt was made to provide a remedy for this, by further legislation during the same session of Congress; but it was unfortunately postponed to the last day of the session, and then, as is too often the consequence of such delay, the provisions which passed into a law were ill considered, and of a character so ambiguous and contradictory, as to be inoperative in accomplishing the purpose designed.

A brief but comprehensive legislative enactment

which should supersede all present statute provisions, and be a full execution of the power conferred upon Congress by the 10th subdivision of the 8th section of the Constitution of the United States, "to make rules concerning captures on land and water," is imperatively required at the earliest practicable moment.

APPENDIX.

NO. I.

LETTER FROM SIR W. SCOTT AND SIR J. NICHOLL TO MR. JAY.

SIR:—I have the honor of sending the paper drawn up by Dr. Nicholl and myself; it is longer and more particular than perhaps you meant; but it appeared to be an error on the better side, rather to be too minute, than to be too reserved in the information we had to give; and it will be in your excellency's power either to apply the whole or such parts as may appear more immediately pertinent to the objects of your inquiry.

I take the liberty of adding, that I shall at all times think myself much honored by any communications from you, either during your stay here, or after your return, on any subject in which you may suppose that my situation can give me the power of being at all useful to the joint interests of both countries. If they should ever turn upon points in which the duties of my official station appear to impose upon me an obligation of reserve, I shall have no hesitation in saying that I feel them to be such. On any other points on which you may wish to have an opinion of mine, you may depend on receiving one that is formed with as much care as I can use, and delivered with all possible frankness and sincerity.

I have the honor to be,

With great respect, etc.,

WILLIAM SCOTT.

COMMONS, *Sept. 10th*, 1794.

PAPER ENCLOSED IN THE FOREGOING LETTER.

SIR:—We have the honor of transmitting, agreeably to your excellency's request, a statement of the general principles of proceeding in prize causes, in British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as a prize within their jurisdiction.

The general principles of proceeding cannot, in our judgment, be stated more correctly or succinctly than we find them laid down in the following extract from a report made to his late majesty in the year 1753, by Sir George Lee, then judge of the prerogative court, Dr. Paul, his majesty's advocate-general, Sir Dudley Rider, his majesty's attorney-general, and Mr. Murray (afterward Lord Mansfield), his majesty's solicitor-general:

"When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other, upon the high seas. Whatever is the property of the enemy, may be acquired by capture at sea; but the property of a friend cannot be taken provided he observes his neutrality.

"Hence the law of nations has established,

"That the goods of an enemy, on board the ship of a friend, may be taken.

"That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

"That contraband goods, going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.

"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, a lawful prize.

"Before the ship, or goods, can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard; and condemnation thereupon as prize, in the court of admiralty, judging by the law of nations and treaties.

"The proper and regular court, for these condemnations, is the court of that state to which the captor belongs.

"The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz.: the papers on board, and the examination on *oath* of the master, and other principal officers; for which purpose there are officers of admiralty in all the considerable seaports of every maritime power at war, to examine the captains, and other principal officers of every ship, brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn, as enemy's property or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into farther proof thereof.

"A claim of ship, or goods, must be supported by the oath of somebody, at least as to belief.

"The law of nations requires good faith. Therefore every ship must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colorable papers; if any papers be thrown overboard; if the master and officers examined in preparatorio, grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages. For which purpose all privateers are obliged to give security for their good behavior; and this is referred to, and expressly stipulated by many treaties.

"Though from the ship's papers, and the preparatory examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not show the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the court of admiralty, viz., the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties.

"In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the law of nations, and particular treaties, all captures at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable."

Such are the principles which govern the proceedings of the prize courts.

The following are the measures which ought to be taken by the captor, and by the neutral claimant upon a ship and cargo being brought in as prize:

The captor immediately upon bringing his prize into port, sends up or delivers upon oath to the registry of the court of admiralty all papers found on board the captured ship. In the course of a few days, the examinations in preparatory of the captain and some of the crew, of the captured ship, are taken upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the admiralty as soon as taken. A monition is extracted by the captor from the registry, and served upon the royal exchange, notifying the capture, and calling upon all persons interested to appear and show cause why the ship and goods should not be condemned. At the expiration of twenty days, the monition is returned into the registry with a certificate of its service, and if any claim has been given, the cause is then ready for hearing, upon the evidence arising out of the ship's papers, and preparatory examinations.

The measures taken on the part of the neutral master or proprietor of the cargo, are as follows:

Upon being brought into port, the master usually makes a protest, which he forwards to London, as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship, and such parts of the cargo as belong to his owners, or with which he was particularly intrusted. Or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps.

The master, correspondent, or consul, applies to a proctor, who prepares a claim supported by an affidavit of the claimant, stating briefly, to whom as he believes, the ship and goods claimed, belong, and that no enemy has any right or interest in them. Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein.

If the captor has neglected in the mean time to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions and by the prize act to proceed immediately to adjudication), a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon return of the monition the cause may be heard. It however seldom happens (owing to the great pressure of business, especially at the commencement of a war) that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition. In that case, each cause must necessarily take its regular turn: correspondent measures must be taken by the neutral master, if carried within the jurisdiction of a vice-admiralty court, by giving a claim supported by his affidavit, and offering security for costs, if the claim should be pronounced grossly fraudulent

If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence) and he afterward applies at the registry of the lords of appeal in prize causes (which is held at the same place as the registry of the high court of admiralty) for an instrument called an inhibition, and which should be taken out within three months, if the sentence be in the high court of admiralty, and within nine months, if in a vice-admiralty court, but may be taken out at later periods, if a reasonable cause can be assigned for the delay that has intervened. This instrument directs the judge whose sentence is appealed from, to proceed no further in the cause; it directs the registrar to transmit a copy of all the proceedings of the inferior court; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant, to the amount of two hundred pounds, to answer costs, in case it should appear to the court of appeals, that the appeal is merely vexatious. The inhibition is to be served upon the judge, the registrar, and the adverse party and his proctor, by showing the instrument under seal, and delivering a note or copy of the contents. If the party cannot be found, and the proctor will not accept the service, the instrument is to be served "*viis et modis*," that is, by affixing it to the door of the last place of residence, or by hanging it upon the pillars of the royal exchange. That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is endorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad.

If the cause be adjudged in a vice-admiralty court, it is usual, upon entering an appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and serve the inhibition, as where the cause has been adjudged in the high court of admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained, by sending over a copy of the instrument of appeal, or by writing to the correspondent an account of the time and substance of the sentence.

Upon an appeal, fresh evidence may be introduced if, upon hearing the cause, the lords of appeal shall be of opinion, that the case is of such doubt, as that farther proof ought to have been ordered by the court below.

Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction and with the real property of the goods claimed. In corroboration of these affidavits may be annexed original correspondence, duplicates of bills of lading, invoices, extracts from books, etc. These papers must be proved by the affidavits of persons who can speak to their authenticity. And if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before the magistrates or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British consul.

The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of heavy suspicion and great importance, the court may order what is called "plea and proof," that is, instead of admitting affidavits and documents introduced by the claimants only, each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or to condemn the capture, and to examine witnesses in support of the allegations, to whom the adverse party may administer interrogatories. The depositions of the witnesses are taken in writing; if the witnesses are to be examined abroad, a commission issues for that purpose; but in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to.

Standing commissions may be sent to America for the *general* purpose of receiving examinations of witnesses in all cases where the court may find it necessary for the purposes of justice, to decree an inquiry to be conducted in that manner.

With respect to captures and condemnations at Martinico, which are the subjects of another inquiry contained in your note, we can only answer in general, that we are not informed of the particulars of such captures and condemnations, but, as we know of no legal court of admiralty established at Martinico, we are clearly of opinion that the legality of any prizes taken there, must be tried in the high court of the admiralty of England, upon claims given, in the manner above described, by such persons as may think themselves aggrieved by the said captures.

We have the honor to be, etc.,

[Signed] WILLIAM SCOTT,
JOHN NICHOLL.

COMMONS, *September 10th*, 1794.

No. II.

THE PRIZE RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

RULE 1.—There shall be issued, under the seal and authority of this court, commissions to such persons as the court shall think fit, appointing them severally commissioners to take examinations of witnesses in prize causes *in preparatorio*, on the standing interrogatories, which have been settled and adopted by this court, and all other depositions which they are empowered to require, and to discharge such other duties in relation to ships, or vessels, or property brought into this district, as prize, as shall be designated by the said commissioners, and the rules and orders of this court.

RULE 2.—The captors of any property brought into this district as prize, or some one on their behalf, shall, without delay, give notice to the district judge, or to one of the commissioners aforesaid, of the arrival of the property, and of the place where the same may be found.

RULE 3.—Upon the receipt of notice thereof from the captors, or district judge, a commissioner shall repair to the place where the said prize property then is; and if the same be a ship, or vessel, or if the property be on board a ship or vessel, he shall cause the said ship or vessel to be safely moored in sufficient depth of water, or in soft ground.

RULE 4.—The commissioner shall, in case the prize be a ship or vessel, examine whether

bulk has been broken; and if it be found that bulk has been broken, one of the said commissioners shall take information upon what occasion, or for what cause, the same was done. If the property captured be not a ship or vessel, or in a ship or vessel, he shall examine the chests, packages, boxes, or casks, containing the subject captured, and shall ascertain whether the same has been opened, and shall, in every case, examine whether any of the property originally captured has been secreted or taken away subsequently to the capture.

RULE 5.—The commissioner in no case shall leave the captured property until he secure the same by seals upon the hatches, doors, chests, bales, boxes, casks, or packages, as the case may require, so that they cannot be opened without breaking the said seals; and the said seals shall not be broken, or the property removed, without the special order of the court, excepting in case of fire and tempest, or of absolute necessity.

RULE 6.—If the captured property be not a vessel, or on board a vessel, the commissioner shall take a detailed account of the particulars thereof, and shall cause the same to be deposited, under the seals as aforesaid, in a place of safety, there to abide the order or decree of this court.

RULE 7.—If no notification shall, within reasonable time, be given by the captors, or by any person in their behalf, of any property which may be brought as prize within this district, and the commissioners, or either of them, shall become informed thereof by any means, it shall be the duty of the said commissioners, or one of them, to repair to the place where such property is, and to proceed in respect to the same as if notice had been given by the captors.

RULE 8.—The captor shall deliver to the judge—at the time of such notice, or to the commissioner or commissioners, when he or they shall, conformably to the foregoing rule, repair to the place where such captured property is, or at such other time as the said commissioners, or either of them, shall require the same—all such papers, passes, sea-briefs, charters, bills of lading, cockets, letters, and other documents and writings, as shall have been found on board the captured ship, or which have any reference to, or connection with the captured property, and which are in the possession, custody, or power of the captors.

RULE 9.—The said papers, documents and writings, shall be regularly marked and numbered by a commissioner, and the captor, chief officer, or some other person who was present at the taking of the prize, and saw that such documents, papers and writings, were found with the prize, must make a deposition before one of the said commissioners, that they have delivered up the same to the judge or commissioner as they were found or received, without any fraud, subduction, or embezzlement. If any documents, papers or writings, relative to, or connected with the captured property, are missing or wanting, the deponent shall, in his said deposition, account for the same, according to the best of his knowledge, information and belief.

RULE 10.—The deponent must further swear, that if, at any time thereafter, and before the final condemnation or acquittal of the said property, any further or other papers relating to the said captured property shall be found or discovered, to the knowledge of the deponent, they shall also be delivered up, or information thereof given to the commissioners or to this court, which deposition shall be reduced to writing by the commissioner, and shall be transmitted to the clerk of the court, as hereinafter mentioned.

RULE 11.—When the said documents, papers and writings, are delivered to a commissioner, he shall retain the same till after the examination *in preparatorio* shall have been made by him, as is hereafter provided, and then he shall transmit the same with the same affidavit in relation thereto, the preparatory examinations, and the information he may have received in regard to the said captured property, under cover and under his seal, to this court, addressed to the clerk thereof, and expressing on the said cover to what captured property the documents relate, or who claim to be the captors thereof, or from whom he received the information of the capture; which said cover shall not be opened without the order of the court.

RULE 12.—Within three days after the captured property shall have been brought within the jurisdiction of this court, the captor shall produce to one of the commissioners three or four, if so many there be, of the company or persons who were captured with, or who claim the said captured property; and in case the capture be a vessel, the master and mate, or supercargo, if brought in, must always be two, in order that they may be examined by the commissioner *in preparatorio* upon the standing interrogatories.

RULE 13.—In the examination of witnesses *in preparatorio*, the commissioner shall use no other interrogatories but the standing interrogatories, unless special interrogatories are

directed by the court. He shall write down the answer of every witness separately to each interrogatory, and not to several interrogatories together; and the parties may personally, or by their agents, attend the examination of witnesses before the commissioners; but they shall have no right to interfere with the examination by putting questions or objecting to questions; nor to take notes of the proceedings before the commissioner, to be used otherwise than before the court. All objections to the regularity or legality of the proceedings of the commissioners must be made to the court.

RULE 14.—When a witness declares he cannot answer to any interrogatory, the commissioner shall admonish the witness that by virtue of his oath, taken to speak the truth, and nothing but the truth, he must answer to the best of his knowledge, or when he does not know absolutely, then to answer to the best of his belief concerning any one fact.

RULE 15.—The witnesses are to be examined separately, and not in presence of each other, and they may be kept from all communication with the parties, their agents or counsel, during the examination. The commissioners will see that every question is understood by the witness, and will take their exact, clear, and explicit answers thereto; and if any witness refuses answer at all, or to answer fully, the examining commissioner is forthwith to certify the facts to the court.

RULE 16.—The captors must produce all their witnesses in succession, and cannot, after the commissioners have transmitted the examination of a part of the crew to the judge, be allowed to have others examined without the special order of the court; and the examination of every witness shall be begun, continued, and finished in the same day, and not at different times. Copies of the standing interrogatories shall not be returned by the commissioner with the examinations, but it shall be sufficient for the answer of the witnesses to refer to the standing interrogatories by corresponding numbers.

RULE 17.—Before any witness shall be examined on the standing interrogatories, the commissioner shall administer to him an oath in the following form: "You shall true answer make to all such questions as shall be asked of you on these interrogatories, and therein you shall speak the whole truth, and nothing but the truth, so help you God." If the witness is conscientiously averse to swearing, an affirmation to the same effect shall be administered to him.

RULE 18.—Whenever the ship's company, or any part thereof, of a captured vessel, are foreigners, or speak only a foreign language, the commissioner taking the examination may summon before him competent interpreters, and put to them an oath, well and truly to interpret to the witness the oath administered to him, and the interrogations propounded, and well and truly to interpret to the commissioners the answers given by the witness to the respective interrogatories.

RULE 19.—The examination of each witness on the standing interrogatories shall be returned according to the following form:

"Deposition of A B, a witness produced, sworn and examined *in preparatorio*, on the day of in the year at the of on the standing interrogatories established by the district court of the United States for the southern district of New-York; the said witness having been produced for the purpose of such examination by C D, in behalf of the captors of a certain ship or vessel called the (or of certain goods, wares, and merchandise, as the case may be.)

"1st. To the first interrogatory the deponent answers, that he was born at &c.

"2d. To the second interrogatory the deponent answers, that he was present at the time of the taking, &c."

RULE 20.—When the interrogatories have all been answered by a witness, he shall sign his deposition, and the commissioner shall put a certificate thereto in the usual form, and subscribe his name to the same.

RULE 21.—No person having or claiming any interest in the captured property, or having any interest in any ship having letters of marque or commissions of war, shall act as a commissioner. Nor shall a commissioner act either as proctor, advocate, or counsel, either for captors or claimants, in any prize cause whatever.

RULE 22.—If the captain or prize-master neglect or refuse to give up and deliver to the commissioners the documents, papers, and writings relating to the captured property, according to these rules, or refuse or neglect to produce, or cause to be produced, witnesses to be examined *in preparatorio*, within three days after the arrival of the captured property within the jurisdiction of this court, or shall otherwise unnecessarily delay the production of

the said documents, papers, or writings, the commissioners, or one of them nearest to the place where the captured property may be, or before whom the examination *in preparatorio* may have been already begun, shall give notice in writing to the delinquent, to forthwith produce the said documents, papers, and writings, and to bring forward his witnesses; and if he shall neglect or delay so to do for the period of twenty-four hours thereafter, such commissioner shall certify the same to this court, that such proceedings may thereupon be had as justice may require.

RULE 23.—If within twenty-four hours after the arrival within this district of any captured vessel, or of any property taken as prize, the captors, or their agents, shall not give notice to the judge or a commissioner, pursuant to the provisions herein made, or shall not, two days after such notice given, produce witnesses to be examined *in preparatorio*, then any person claiming the captured property and restoration thereof, may give notice to the judge or the commissioners as aforesaid, of the arrival of the said captured property; and thereupon such proceedings may be had by the commissioners in respect to the said property, and relative to the documents, papers, and writings connected with the said capture, which the claimant may have in his possession, custody, or power, and relative to the examination of witnesses *in preparatorio*, as near as may be, as is before provided for in cases where the captors shall give notice and examine *in preparatorio*. And the said claimant may in such cases file his libel for restitution, and proceed thereon according to the rules and practice of this court.

RULE 24.—As soon as may be convenient, after the captured property shall have been brought within the jurisdiction of this court, a libel may be filed, and a monition shall thereupon be issued, and such proceedings shall be had as are usual in conformity to the practice of this court, in cases of vessels, goods, wares, and merchandise seized as forfeited, in virtue of any revenue law of the United States.

RULE 25.—In all cases, by consent of captor and claimant, or upon attestation exhibited upon the part of the claimant only, without consent of the captor, that the cargo or part thereof is perishing or perishable, the claimant specifying the quantity and quality of the cargo, may have the same delivered to him, on giving bail to answer the value thereof if condemned, and further to abide the event of the suit; such bail to be approved of by the captor, or otherwise the persons who give security swearing themselves to be severally and truly worth the sum for which they give security. If the parties cannot agree upon the value of the cargo, a decree or commission of appraisement may issue from the court to ascertain the value.

RULE 26.—In cases where there is no claim, an affidavit being exhibited on the part of the captor of such perishing or perishable cargo, specifying the quantity and quality thereof, the captor may have a decree or commission of appraisement and sale of such cargo, the proceeds thereof to be brought into court, to abide the further orders of the court.

RULE 27.—The name of each cause shall be entered by the clerk upon the docket for hearing in their order, according to the dates of the returns of the monitions, and lists of the causes ready for hearing are to be constantly hung up in the clerk's office, for public inspection.

RULE 28.—In all cases where a decree or commission of appraisement and sale of any ship and cargo, or either of them, shall have issued, no question respecting the adjudication of such ship and goods, or either of them, as to freight or expenses, shall be heard till the said decree or commission shall be returned, with the account of sales, and the proceeds according to such account of sales, be paid into court, to abide the order of the court in respect thereto.

RULE 29.—After the examination, taken *in preparatorio* on the standing interrogatories, is brought into the clerk's office, and the monition has issued, no further or other examinations upon the said interrogatories shall be taken, or affidavits received, without the special directions of the judge, upon due notice given.

RULE 30.—None but the captors can, in the first instance, invoke papers from one captured vessel to another, nor can it be done without the special mandate of the judge; and, in case of its allowance, only extracts from the papers are to be used.

RULE 31.—The invocation shall only be allowed on affidavit on the part of the captors, satisfying the court that such papers are material and necessary.

RULE 32.—Application for permission to invoke must be on service, at least two days previously, of notice thereof, and copy of the affidavit on the claimants, or their agent (if

known to be in this port); and after invocation allowed to the captors, the claimants, by permission of the judge, for sufficient cause shown, may use other extracts of the same papers in explanation of the parts invoked.

RULE 33.—But when the same claimants intervene for different vessels, or for goods, wares, or merchandise captured on board different vessels, and proofs are taken in the respective causes, and the causes are on the dockets for trial at the same time, the captors may, on the hearing in court, invoke, of course, in either of such causes, the proofs taken in any other of them; the claimants, after such invocation, having liberty to avail themselves also of the proofs in the cause invoked.

RULE 34.—In all motions for commissions, and decrees of appraisement and sale, the time shall be specified within which it is prayed that the commissions or decrees shall be made returnable.

RULE 35.—The commissioners shall make regular returns on the days in which their commission or decrees are returnable, stating the progress that has been made in the execution of the commission or decrees, and, if necessary, praying an enlargement of the time for the completion of the business.

RULE 36.—The commissions shall bring in the proceeds which have been collected at the time of their returns; and they may be required from time to time to make partial returns of such sums only as are necessary to cover expenses.

RULE 37.—On the returns of commissions or decrees, the commissioners or the marshal must bring in all the vouchers within their control.

RULE 38.—All moneys brought into court in prize causes shall be forthwith paid into such bank, in the city of New York, as shall be appointed for keeping the moneys of the court, and shall only be drawn out on the specific orders of the court, in favor of the persons respectively having right thereto, or their agents or representatives, duly authorized to receive the same.

RULE 39.—At every stated term of the court, the clerk shall exhibit to the court a statement of all moneys paid into court in prize cases, designating the amount paid in each particular case, and at what time.

RULE 40.—The statement, when approved by the court, shall be filed of record in the clerk's office, and be open to the inspection of all parties interested, and certified copies thereof shall be furnished by the clerk, on request, to any party in interest, his proctor or advocate.

RULE 41.—When property seized as prize of war is delivered upon bail, a stipulation, according to the course of the admiralty, is to be taken for double its value.

RULE 42.—Every claim interposed must be by the parties in interest, if within convenient distance—or in their absence, by their agent or the principal officer of the captured ship—and must be accompanied by a test affidavit, stating briefly the facts respecting the claim, and its verity, and how the deponent stands connected with or acquired knowledge of it. The same party who may intervene is also competent to attest to the affidavit.

RULE 43.—The captors of property brought in or held as prize, or which may have been carried into a foreign port, and there delivered upon bail by the captors, shall forthwith libel the same in fact, and sue out the proper process. The first process may, at the election of the party, be a warrant for the arrest of the property or person, to compel a stipulation to abide the decree of the court, or a monition.

RULE 44.—The monitions shall be made returnable in ten days, and if the property seized as prize is in port, shall be served in the same way as in the case of monitions issued on the instance side of the court of admiralty on seizure for forfeiture under the revenue laws. In case the property claimed as prize is not in port, then the monition is to be served on the parties in interest, their agent or proctor, if known to reside in the district, otherwise by publication daily in one of the newspapers of this city, for ten successive days preceding the return thereof.

RULE 45.—Whenever the jurisdiction of the court is invoked upon matters as incident to prize, except as to the distribution of prize money, there must be distinct articles or allegations in that behalf in the original libel or claim on the part of the party seeking relief. But in case the matters have arisen or become known to the party subsequent to presenting his libel or claim, the court will allow him to file the necessary amendments.

RULE 46.—No permission will be granted to either party to introduce further proofs until after the hearing of the cause upon the proofs originally taken.

RULE 47.—In case of captures by the public armed vessels of the United States, and a proceeding for condemnation against the property seized as prize *jure belli*, or in the nature of prize of war, under any act of Congress, the name of the officer under whose authority the capture was made must be inserted in the libel.

RULE 48.—A decree of contumacy may be had against any party not obeying the orders or process of the court, duly served upon him; and thereupon an attachment may be sued out against him. But no constructive service of a decree or process *viis et modis*, or *publica citatio*, will be sufficient, unless there has been a publication thereof in a daily paper in this city, at least ten days immediately preceding the motion for an attachment.

RULE 49.—When damages are awarded by the court, the party entitled thereto may move for the appointment of three commissioners to assess the same; two persons approved by the court will thereupon be associated with a standing commissioner of the circuit court, the clerk or deputy clerk of this court, if not interested in the matter, whose duty it shall be to estimate and compute the damages, in conformity to the principles of the decree, and return a specific report to the court of the amount of damages, and the particular items of which they are composed.

RULE 50.—Any party aggrieved may have such assessment of damages reviewed in a summary manner by the court, before final decree rendered thereon, on giving two days' previous notice to the proctor of the party in whose favor the assessment is made, of the exceptions he intends taking, and causing to be brought before the court the evidence given the commissioners in relation to the particular excepted to.

RULE 51.—Every appeal from the decrees of this court must be made within ten days from the time the decree appealed from is entered, otherwise the party entitled to the decree may proceed to have it executed. No appeal shall stay the execution of a decree, unless the party, at the time of entering the appeal, gives a stipulation, with two sureties, to be approved by the clerk, in the sum of two hundred and fifty dollars, to pay all costs and damages that may be awarded against him, and to prosecute the appeal to effect.

RULE 52.—If the party appealing is afterwards guilty of unreasonable delay in having the necessary transcripts and proceedings prepared for removing the cause, it will be competent to the other party to move the court for leave to execute the decree, notwithstanding the appeal.

RULE 53.—In all cases of process *in rem*, the property after arrest is deemed in the custody of the court, and the marshal cannot surrender it on bail, or otherwise, without the special order of the court.

No. III.

STANDING INTERROGATORIES TO WITNESSES EXAMINED IN PREPARATIO.

Let each witness be interrogated to every of the following questions, and their answers to each interrogatory be written down under his direction and supervision:

1. Where were you born, and where do you now live, and how long have you lived there. Of what prince or state are you a subject or citizen, and to which do you owe allegiance. Are you a citizen of the United States of America. Are you a married man, and, if married, where do your family and wife reside?

2. Were you present at the capture or taking of the vessel, or her lading, or any of the goods or merchandises concerning which you are now examined?

3. When and where was such seizure and capture made, and into what place or port were the same carried. Had the vessel so captured any commission, or letters, authorizing her to make prizes. What and from whom. For what reasons or on what pretence was the seizure made?

4. Under what colors did the captured vessel sail. What other colors had she on board, and for what reason had she such other colors?

5. Was any resistance made at the time of the capture, and by whom. Were any guns fired, how many, and by whom. By what ship or ships was the capture made. Were any other and what ships in sight at the time of the capture. Was the vessel captured a mer-

chantman, a ship of war, or acting under any commission as a privateer or letter of marque and reprisal, and to whom did such vessel belong. Was the capturing vessel a ship of war, a letter of marque and reprisal, or privateer, and of what force?

6. Had the capturing vessel or vessels any commission to act in the seizure or capture of the vessel inquired about, and from whom, and by what particular vessel was the capture made. Was the vessel seized condemned, and if so, when and where, and for what reason, and upon what account, and by whom, and by what authority or tribunal was she condemned?

7. What was the name of the vessel taken, and of her master or commander. Who appointed him to the command of the said vessel, and where. How long have you known the vessel and him, and when and where did he take possession of her, and who by name delivered the same to him. Where is the fixed place of abode of the master, with his wife and family, and how long has he lived there. If he has no fixed place of abode, where was his last place of residence, and how long did he live there. Where was he born. Of what country or state is he a subject or citizen?

8. Of what tonnage or burden is the vessel which has been taken, and about which you are examined. What number of the vessel's company belonged to her at the time she was seized and taken, and how many were then actually on board her. What countrymen are they. Did they all come on board at the same port and time, or at different ports and times, and when and where. Who shipped or hired them, and when or where?

9. Did you belong to the company of the vessel so captured at the time of her seizure, and in what capacity. Had you, or any of the officers, or mariners, or company, belonging to the said vessel at the time of her capture, any part, share, or interest in the same, or in the goods or merchandise laden on board her, and in what particular, and what was the value thereof at the time the said vessel was captured, and the said goods seized?

10. How long have you known the said vessel. When and where did you first see her. How many guns did she carry. How many men were on board of her at the beginning of the engagement, before she was captured. Of what country build was she. What was her name, and how long was she so called. Whether do you know of any other name she was called by, and what were such names, as you know or have heard?

11. To what ports and places was the vessel concerning which you are now examined bound, on the voyage wherein she was taken and seized. Where did the voyage begin, and where was the voyage to have ended. What sort of lading did she carry at the time of her first setting out on the voyage, and what particular sort of lading and goods had she on board at the time she was taken and seized. In what year and in what month was the same put on board. Do you or not know she had on board during her last voyage, and when, goods contraband of war, or otherwise prohibited by law, and what goods?

12. Had the vessel of which you are examined any passport or sea-brief on board, and from whom. To what ports or places did she sail during her last voyage, before she was taken. Where did her last voyage begin, and where was it to have ended. Set forth the kind of cargoes the vessel has carried to the time of her capture, and at what ports such cargoes have been delivered. From what ports, and at what time, particularly from the last clearing port, did the said vessel sail, previously to the capture?

13. What lading did the vessel carry at the time of her first setting sail in her last voyage, and what particular sort of lading and goods had she on board at the time she was taken. In what year and in what month was the same put on board? Set forth the different species of the lading and the quantities of each sort.

14. Who were the owners of the vessel and goods concerning which you are now examined, at the time of their capture and seizure. How do you know they were owners thereof at that time. Of what nation or country are they by birth, and where do they live with their wives and families. How long have they resided there. Where did they reside previously, to the best of your knowledge. Of what country or state are they subjects or citizens?

15. Was any bill of sale given, and by whom, to the owners of the said vessel, and in what month and year. Where, and in presence of what witnesses was it made. Was any, and what engagement entered into concerning the purchase, further than what appears upon the bill of sale. Where did you last see it, and what has become of it?

16. In what port or place, and in what month or year, was the lading found on board the vessel, at the time of her capture or seizure, first put on board her. What were the names

of the respective laders or owners, or consignees thereof. What countrymen are they. Where did they reside before, to the best of your knowledge, and where were the said goods to be delivered, and for whose real account, risk or benefit. Have any of the said laders or consignees any and what interest in the said goods. What were the several qualities, quantities, and particulars of the said goods, and have you any and what reason to know or fully believe that if the said goods shall be restored and unladen at the destined ports, they did, do, and will belong to the same persons, and to none others?

17. How many bills of lading were signed for the goods seized on board the said vessel. Were any of those bills of lading false or colorable, or were any bills of lading signed which were different in any respect from those which were on board the vessel at the time she was taken. What were the contents of such other bills of lading, and what became of them?

18. Have you in your possession, or were there on board of the said vessel, at the time of her capture, any bills of lading, invoices, letters, or other writings, to prove or show your own interest, or the interest of any other person, and of whom, in the vessel or in the goods concerning which you are now examined? If in your power produce the same, and set forth the particular times when, where, and in what manner, and upon what consideration, you became possessed thereof. If you cannot produce such paper evidences, then state in whose possession you last saw them, or where you know or believe they are kept, and when, and by whom they were brought or sent within this district, and also set forth the contents or purport of such papers.

19. State the degrees of latitude and longitude in which the said vessel and her cargo were captured, as also the year, month, and day, and time thereof, in which such seizure was made, and in or near what port or place, and whether it was a port of any state or territory of the United States of America, and what one. Was any charter party for the voyage upon which the said vessel was captured, signed, and executed, and by whom and when? If in your possession, produce the same. If not, set forth its contents and state what has become of it.

20. What papers, bills of lading, letters, or other writings relating to the vessel or cargo, were on board the vessel at the time she took her departure from her last clearing port, before she was taken as prize. Were any of them burnt, torn, thrown overboard, destroyed, or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

21. Did you or the owner, master, or person having command of the said vessel or her navigation, at the time and place of her capture, know or have notice that such place or port was in a state of war with the United States, and that the naval forces of the United States held such a port in a state of blockake. How, when, or where had you such knowledge or notice, and when and where did the master or commandant of said vessel obtain it?

22. Was such port under an order of blockade by the government of the United States, at the time the said vessel entered or made an attempt to enter the same. Had warning or notice of such blockade been given to, or received by the owner, master, or commandant of said vessel, before or at the time she entered, or attempted to enter said port, and when, and in what manner. Had notice in writing been endorsed on the register or other ship's papers of the said vessel, and when, where, and by whom, of an existing blockade of such port, before she entered, or attempted to enter the same, or before the time of her sailing, or attempting to sail therefrom?

23. Was the register of the vessel, about which you are examined, shown to, or examined by any officer of the United States navy, or by any revenue officer of the United States, before she was captured and taken, and before she entered the port at, or near which, she was taken and seized, and was the register, or other ship's papers, endorsed by said United States officer? Declare fully all you know, or have reason to believe, respecting this interrogatory, stating the persons, times, and places connected therewith.

24. Do you know, or do you believe from information, and if the latter, from what information, and when and how was it obtained, that the vessel inquired about, at any time or times, after the blockade of the said port, and with notice thereof, and when, attempted covertly and secretly to enter the said blockaded port, or to sail therefrom, without success? Disclose fully all your knowledge, information, and belief thereon, with the particulars upon which the same is founded.

25. Has the vessel, concerning which you are now examined, been at any time, and when,

seized as prize and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned.

26. Have you sustained any loss by the seizing and taking the vessel concerning which you are now examined. If yea, in what manner do you compute such your loss. Have you already received any indemnity, satisfaction, or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when and from whom?

27. Is the said vessel or goods, or any, and what parts, insured. If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

28. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any person, and whom. Or was the lader to take the chance of the market for the sale of his goods?

29. Let each witness be interrogated of the growth, produce, and manufacture, on board the vessel; of what country and place was the lading concerning which they are now interrogated, or any part thereof.

30. Whether all the said cargo, or any and what part thereof, was taken from the shore, or quay, or removed, or transshipped from one vessel to another, from what and to what shore, quay, and vessel, and when and where was the same so done.

31. Are there in any country besides the United States, and where, or on board any and what vessel, or vessels, other than the vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers, or documents, relative to the said vessel or cargo, and of what nature are they, and what are their contents?

32. Were any papers delivered out of the said vessel, and carried away in any manner whatsoever, and when, and by whom, and to whom, and in whose custody, possession, or power, do you believe the same now are?

33. Was bulk broken during the voyage on which you were taken, or since the capture of the said vessel, and when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

34. Were any passengers on board the aforesaid vessel; were any of them secreted at the time of the capture. Who were the passengers by name. Of what nation, rank, profession, or occupation. Had they any commission—for what purpose, and from whom. From what place were they taken on board, and when. To what place were they finally destined, and upon what business. Had any, and which of the passengers, any and what property, or concern, or authority, directly or indirectly, regarding the vessel and cargo. Were there any officers, soldiers, or mariners secreted on board, and for what reason were they secreted. Were any citizens of the United States on board, or secreted, or confined, at the time of the capture. How long, and why. Whether any persons on board the said vessel, at the time of her capture, were citizens or residents of any state or territory of the United States, then in a state of war or rebellion against the United States, its government and laws. If so, who by name, and of what state or territory. What was their employment on board the vessel, and what their destination?

35. Were and are all the passports, sea-briefs, charter parties, bills of sale, invoices, and papers, which were found on board, entirely true and fair, or are any of them false or colorable. Do you know of any matter or circumstance to affect their credit. By whom were the passports or sea-briefs obtained, and from whom. Were they obtained for this vessel only, and upon the oath or affirmation of the persons therein described, or were they delivered to or on behalf of the person or persons who appear to have been sworn or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation. How long a time were they to last. Was any duty or fee payable and paid for the same, and is there any duty or fee to be paid on the renewal thereof. Have such passports been renewed, and how often, and has the duty or fee been paid for such renewal. Was the vessel in a port in the country where the passports and sea-briefs were granted, and if not, where was the vessel at the time. Had any person on board any passport, license, or letters of safe conduct. If yea, from whom, and for what business. If it should appear that there are in the United States, or in any other place or country besides the United States, any bills of lading, invoices, instruments, or papers, relative to the vessel and goods concerning which you are now examined, state how they were brought into such place or country. In whose possession are they, and do they differ from any of the papers on board,

or in the United States, or elsewhere, and in what particular do they differ. Have you written or signed any letters or papers concerning the vessel and her cargo. What was their purport. To whom were they written and sent, and what has become of them?

36 Toward what port or place was the vessel steering her course, at the time of her being first pursued and taken. Was her course altered upon the appearance of the vessel by which she was taken. Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship papers. Was the vessel, before or at the time of her capture, sailing beyond or wide of the said place or port to which she was so destined by the said ship papers. At what distance was she therefrom. Was her course altered at any, and what time, and to what other port or place, and for what reason?

37. By whom and to whom hath the said vessel been sold or transferred, and how often. At what time and at what place, and for what sum or consideration, has the same been paid or satisfied. Was the sum paid, or to be paid, a fair and true equivalent, or what security or securities have been given for the payment of the same; and by whom, and where do they now live. Do you know, or believe in your conscience, such sale or transfer has been truly made, and not for the purpose of covering or concealing the real property. Do you verily believe that if the vessel should be restored, she will belong to the persons now asserted to be the owners, and to none others?

38. What guns were mounted on board the vessel, and what arms and ammunition were belonging to her. Why was she so armed. Were there on board any other guns, weapons, warlike arms, or armament of any name or description, and if any, what. Were there any parts of warlike arms, not put together or finished, or any ammunition, fixed or unfixed, or any balls, shells, rockets, hand grenades, flints, percussion caps, or any other thing known to be intended for military equipment. Were there any belts, ball moulds, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing, or accoutrements, or any parts of them, or any sort of warlike or naval stores. Were any of such warlike or naval stores, or things, thrown overboard to prevent suspicion at the time of the capture; and were any such warlike stores, before described, concealed on board under the name of merchandise, or any other colorable appellation, in the ship papers. If so, what are the marks on the casks, bales, and packages in which they were concealed. Are any of the before-named articles, and which, for the sole use of any fortress or garrison in the port or place to which such vessel was destined. Do you know, or have you heard of any ordinance, placard, or law, existing in such country or state, forbidding the exportation of the same by private persons, without license. Were such warlike or naval stores put on board by any public authority. When and where were they put on board?

39. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the vessel and cargo concerning which you are now examined, at the time of the capture?

40. Did the said vessel, on the voyage in which she was captured (or on), or during any or what former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels. For what reason or purpose did she sail under such convoy. Of what force was or were such convoying ship or ships, and to what state or country did the same belong. What instructions or directions had you or did you receive on each and every of such voyages, when under convoy, respecting your sailing or keeping in company with such armed or convoying ship or ships; and from whom did you receive such instructions or directions. Had you any, and what directions or instructions, and from whom, for resisting, or endeavoring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your vessel's documents and papers; or any, and what other papers, that might be or were put on board your said ship. If so, state the tenor of such instructions and all particulars relating thereto. Are you in possession of such instructions, or copies thereof? If so, leave them with the commissioner, to be annexed to your deposition.

41. Did the said vessel, during the voyage in which she was captured, or on making any and what former voyage or voyages, sail to, or attempt to enter any port under blockade by the arms or forces of any, and what belligerent power. If so, when did you first learn or hear of such port being so blockaded, and were you at any, and what time, and by whom warned not to proceed to, or attempt to enter into, or to escape from such blockaded port. What conversation or other communication passed thereon. And what course did you pursue upon and after being so warned off?

42. Whether or no the vessel, concerning which you are examined, did sail on her last voyage, prior to her seizure, carrying a commission or license as a privateer, or letter of marque and reprisal, or other authority from any person or persons, to cruise against the persons or property of the citizens of the United States, and to make prizes thereof. By whom was such authority, license, or direction given, and when. Was it in writing. If so, did it remain with the vessel up to the time of her capture, or was it destroyed or concealed previous thereto. When, and by whom. What are the contents or purport thereof? State all the facts in your knowledge within this inquiry, and the sources of such knowledge. Also state fully all the acts known to you to have been done by the vessel, her master or crew, under such commission or license, up to the period of her capture.

43. Whether or no the said vessel inquired about, at any time, and when and where, sailed or acted in company or concert with any other armed vessel or vessels, and what, in cruising against, pursuing, or seizing as prize, any persons, vessels, or property of citizens of the United States? Declare fully and particularly your knowledge, information, and belief therein.

No. IV.

PROVISIONS OF THE ACT OF CONGRESS OF 1800, CHAP. 33, §§ 5 AND 6,

PROVIDING FOR THE DISTRIBUTION OF PROCEEDS OF PRIZES MADE BY PUBLIC ARMED SHIPS.

SEC. 5. *And be it further enacted*, That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.

SEC. 6. *And be it further enacted*, That the prize money, belonging to the officers and men, shall be distributed in the following manner:

1. To the commanding officers of fleets, squadrons, or single ships, three-twentieths, of which the commanding officer of the fleet or squadron shall have one-twentieth, if the prize be taken by a ship or vessel acting under his command, and the commander of single ships two-twentieths; but where the prize is taken by a ship acting independently of such superior officer, the three-twentieths shall belong to her commander.

2. To sea lieutenants, captains of marines, and sailing masters, two-twentieths; but where there is a captain, without a lieutenant of marines, these officers shall be entitled to two-twentieths and one-third of a twentieth, which third, in such case, shall be deducted from the share of the officers mentioned in article No. 3, of this section.

3. To chaplains, lieutenants of marines, surgeons, pursers, boatswains, gunners, carpenters, and master's mates, two-twentieths.

4. To midshipmen, surgeon's mates, captain's clerks, school-masters, boatswain's mates, gunner's mates, carpenter's mates, ship's stewards, sailmakers, masters-at-arms, armorers, cockswains, and coopers, three-twentieths and a half.

5. To gunner's yeomen, boatswain's yeomen, quartermasters, quarter gunners, sailmaker's mates, sergeants and corporals of marines, drummers, fifers, and extra petty officers, two-twentieths and a half.

6. To seamen, ordinary seamen, marines, and all other persons doing duty on board, seven-twentieths.

7. Whenever one or more public ships or vessels are in sight at the time any one or more ships are taking a prize or prizes, they shall all share equally in the prize or prizes, according to the number of men and guns on board each ship in sight.

No commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command; nor of such prizes as may have been taken by ships or vessels intended to be placed under his command, before they have acted under his immediate orders; nor shall a commander of a fleet or squadron, leaving the station where he had the command, have any share in the prizes taken by ships left on such station, after he has gone out of the limits of his said command.

No. V.

ACT OF CONGRESS OF JUNE 26TH, 1812, CHAP. 107, § 4.

PROVIDING FOR THE DISTRIBUTION OF PROCEEDS OF PRIZES TAKEN BY PRIVATEERS.

And be it further enacted, That all captures and prizes of vessels, and property, shall be forfeited and shall accrue to the owners, officers and crews of the vessels by whom such captures and prizes shall be made, and on due condemnation had, shall be distributed according to any written agreement which shall be made between them—and if there be no such agreement, then, one moiety to the owners, and the other moiety to the officers and crew, to be distributed between the officers and crew, as nearly as may be according to the rules prescribed for the distribution of prize money by the act, entitled "An act for the better government of the navy of the United States," passed the 23d day of April, one thousand eight hundred.

No. VI.

THE PROCLAMATIONS.

A PROCLAMATION, BY THE PRESIDENT OF THE UNITED STATES.

WHEREAS, The laws of the United States have been for some time past and now are opposed, and the execution thereof obstructed, in the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law:

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, in virtue of the power in me vested by the constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several states of the Union, to the aggregate number of 75,000, in order to suppress said combinations, and to cause the laws to be duly executed. The details for this object will be immediately communicated to the state authorities through the War Department.

I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the integrity, and the existence of our National Union and the perpetuity of popular government, and to redress wrongs already long enough endured.

I deem it proper to say that the first service assigned to the force hereby called forth, will probably be to repossess the forts, places and property which have been seized from the Union, and in every event, the utmost care will be observed, consistently with the objects aforesaid, to avoid any devastation, any destruction of, or interference with property, or any disturbance of peaceful citizens in any part of the country; and I hereby command the persons composing the combinations aforesaid, to disperse and retire peaceably to their respective abodes within twenty days from this date.

Deeming that the present condition of public affairs presents an extraordinary occasion, I do hereby, in virtue of the power in me vested by the constitution, convene both houses of Congress. The senators and representatives are therefore summoned to assemble at their respective chambers at twelve o'clock, noon, on Thursday, the fourth day of July next, then and there to consider and determine such measures as, in their wisdom, the public safety and interest may seem to demand.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this fifteenth day of April, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-fifth.

By the President: ABRAHAM LINCOLN.

WILLIAM H. SEWARD, *Secretary of State.*

PROCLAMATION BY JEFFERSON DAVIS.

WHEREAS, Abraham Lincoln, President of the United States, has by proclamation announced the intention of invading the confederacy with an armed force for the purpose of capturing its fortresses, and thereby subverting its independence and subjecting the free people thereof to the dominion of a foreign power; and whereas it has thus become the duty of this government to repel the threatened invasion and defend the rights and liberties of the people by all the means which the laws of nations and usages of civilized warfare place at its disposal:

Now, therefore, I, JEFFERSON DAVIS, President of the Confederate States of America, do issue this my proclamation, inviting all those who may desire by service in private armed vessels on the high seas to aid this government in resisting so wanton and wicked an aggression, to make application for commissions or letters of marque and reprisal, to be issued under the seal of these Confederate States; and I do further notify all persons applying for letters of marque, to make a statement in writing, giving the name and suitable description of the character, tonnage, and force of the vessel, name of the place of residence of each owner concerned therein, and the intended number of crew, and to sign such statement, and deliver the same to the secretary of state or collector of the port of entry of these Confederate States, to be by him transmitted to the secretary of state; and I do further notify all applicants aforesaid, before any commission or letter of marque is issued to any vessel or the owner or the owners thereof and the commander for the time being, they will be required to give bond to the Confederate States, with at least two responsible sureties not interested in such vessel, in the penal sum of five thousand dollars, or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of ten thousand dollars, with the condition that the owners, officers, and crew who shall be employed on board such commissioned vessel shall observe the laws of these Confederate States and the instructions given them for the regulation of their conduct, that shall satisfy all damages done contrary to the tenor thereof by such vessel during her commission, and deliver up the same when revoked by the president of the Confederate States; and I do further specially enjoin on all persons holding office, civil and military, under the authority of the Confederate States, that they be vigilant and zealous in the discharge of the duties incident thereto; and I do, moreover, exhort the good people of these Confederate States, as they love their country, as they prize the blessings of free government, as they feel the wrongs of the past and those now threatened in an aggravated form by those whose enmity is more implacable because unprovoked, they exert themselves in preserving order, in promoting concord, in maintaining the authority and efficacy of the laws, and in supporting and invigorating all the measures which may be adopted for a common defence, and by which, under the blessing of Divine Providence, we may hope for a speedy, just, and honorable peace.

In witness whereof, I have set my hand and have caused the seal of the Confederate States of America to be attached this seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty-one.

JEFFERSON DAVIS.

ROBERT TOOMBS, *Secretary of State.*

A PROCLAMATION, BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

WHEREAS, an insurrection against the government of the United States has broken out in the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, and the laws of the United States for the collection of the revenue cannot be efficiently executed therein conformably to that provision of the constitution which requires duties to be uniform throughout the United States:

And whereas, a combination of persons, engaged in such insurrection, have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas, and in waters of the United States:

And whereas, an executive proclamation has been already issued, requiring the persons engaged in these disorderly proceedings to desist therefrom, calling out a militia force for the purpose of repressing the same, and convening Congress in extraordinary session to deliberate and determine thereon:

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, with a view to the same purposes before mentioned, and to the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the states aforesaid, in pursuance of the laws of the United States and of the laws of nations in such cases provided. For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo, as prize, as may be deemed advisable.

And I hereby proclaim and declare that if any person, under the pretended authority of said states, or under any other pretence, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy.

By the President: ABRAHAM LINCOLN.

WILLIAM H. SEWARD, *Secretary of State.*

WASHINGTON, *April* 19, 1861.

A PROCLAMATION, BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

WHEREAS, for the reasons assigned in my proclamation of the 19th instant, a blockade of the ports of the states of South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi and Texas was ordered to be established:

And whereas, since that date, public property of the United States has been seized, the collection of the revenue obstructed, and duly commissioned officers of the United States, while engaged in executing the orders of their superiors, have been arrested and held in custody as prisoners, or have been impeded in the discharge of their official duties without due legal process, by persons claiming to act under authorities of the states of Virginia and North Carolina, an efficient blockade of the ports of those states will also be established.

By the President: ABRAHAM LINCOLN.

WILLIAM H. SEWARD, *Secretary of State.*

WASHINGTON, *April* 27, 1861.

THE BLOCKADE.—TO ALL WHOM IT MAY CONCERN.

UNITED STATES FLAG-SHIP CUMBERLAND,
OFF FORTRESS MONROE, Va., *April* 30, 1861.

I hereby call attention to the proclamation of his Excellency, Abraham Lincoln, President of the United States, under date of April 27, 1861, for an efficient blockade of the ports of Virginia and North Carolina, and warn all persons interested that I have a sufficient naval force here for the purpose of carrying out that proclamation.

All vessels passing the capes of Virginia coming from a distance and ignorant of the proclamation, will be warned off, and those passing Fortress Monroe will be required to anchor under the guns of that fort and subject themselves to an examination.

G. J. PENDERGRAST, *Flag Officer, commanding Home Squadron.*

A PROCLAMATION, BY THE PRESIDENT OF THE UNITED STATES.

WASHINGTON, *Friday, May* 3, 1861.

WHEREAS, existing exigencies demand immediate and adequate measures for the protection of the National Constitution and the preservation of the National Union, by the suppression of the insurrectionary combinations now existing in several states for opposing the laws of the Union and obstructing the execution thereof, to which end a military force in addition to that called forth by my proclamation of the fifteenth day of April, in the present year, appears to be indispensably necessary, now, therefore, I, ABRAHAM LINCOLN, President of the United States, and commander-in-chief of the army and navy thereof, and of the mili-

tia of the several states, when called into actual service, do hereby call into the service of the United States forty-two thousand and thirty-four volunteers, to serve for a period of three years, unless sooner discharged, and to be mustered into service as infantry and cavalry. The proportions of each arm and the details of enrolment and organization will be made known through the Department of War; and I also direct that the regular army of the United States be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of 22,714 officers and enlisted men, the details of which increase will also be made known through the Department of War; and I further direct the enlistment, for not less than one nor more than three years, of 18,000 seamen, in addition to the present force, for the naval service of the United States. The details of the enlistment and organization will be made known through the Department of the Navy. The call for volunteers hereby made, and the direction for the increase of the regular army, and for the enlistment of seamen hereby given, together with the plan of organization adopted for the volunteers and for the regular forces hereby authorized, will be submitted to Congress as soon as assembled.

In the mean time I earnestly invoke the co-operation of all good citizens in the measures hereby adopted for the effectual suppression of unlawful violence, for the impartial enforcement of constitutional laws, and for the speediest possible restoration of peace and order, and with those of happiness and prosperity throughout our country.

By the President: ABRAHAM LINCOLN.

WILLIAM H. SEWARD, *Secretary of State.*

PROCLAMATION BY QUEEN VICTORIA.

VICTORIA R.—Whereas we are happily at peace with all sovereigns, powers and states, and whereas hostilities have unhappily commenced between the government of the United States of America and certain states styling themselves the Confederate States of America, and whereas, *we being at peace with the government of the United States, have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties:* We, therefore, have thought fit, by and with the advice of our privy council, to issue this our royal proclamation. [The provisions of the Foreign Enlistment Act are here cited.] And we do hereby warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral sovereign in the said contest, or in violation or in contravention of the law of nations: as, for example, more especially, by entering into the military service of either of the said contending parties as commissioned or non-commissioned officers or soldiers; or by serving as officers, sailors or marines on board any ship, or vessel of war, or transport of or in the service of either of the said contending parties; or by serving as officers, sailors, or marines on board any privateer bearing letters of marque of or from either of the said contending parties; or by engaging to go, or going to any place beyond the seas with an intent to enlist or engage in any such service; or by procuring or attempting to procure within her majesty's dominions at home or abroad others to do so; or by fitting out, arming, or equipping any ship or vessel to be employed as a ship of war, or privateer, or transport by either of the said contending parties; *or by breaking or endeavoring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties;* or by carrying officers, soldiers, dispatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations, for the use or service of either of the said contending parties. *All persons so offending will incur and be liable to the several penalties and penal consequences* by the said statute, or by the law of nations in that behalf imposed and decreed.

And we do hereby declare that all our subjects and persons entitled to our protection, who may misconduct themselves in the premises, will do so at their peril and of their own wrong, and that they will in nowise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct.

No. VII.

DISTRIBUTION OF PRIZE MONEY.

ACT OF CONGRESS, JULY 17TH, 1862.

SEC. 2. *And be it further enacted*, That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels, making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.

SEC. 3. *And be it further enacted*, That the prize money belonging to the officers and men shall be distributed in the following manner:

First. To the commanding officer of a fleet or squadron, one-twentieth part of all prize money awarded to a vessel or vessels under his immediate command.

Second. To the commander of a single ship, one-tenth part of all prize money awarded to the ship under his command, if such ship, at the time of making the capture, was under the immediate command of the commanding officer of a fleet or squadron, and three-twentieths if his ship was acting independently of such superior officer.

Third. The share of the commanding officer of the fleet or squadron, if any, and the share of the commander of the ship being deducted, the residue shall be distributed and apportioned among all others doing duty on board, and borne upon the books, according to their respective rates of pay in the service.

Fourth. When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize, and the money awarded shall be apportioned among the officers and men of the several vessels according to the rates of pay of all on board who are borne upon the books, after deducting one-twentieth to the flag-officer, if there be any such entitled to share.

Fifth. No commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command; nor of such prizes as may have been taken by ships or vessels intended to be placed under his command before they have acted under his immediate orders; nor shall a commander of a fleet or squadron, leaving the station where he had the command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to a successor.

Sixth. No officer or other person who shall have been temporarily absent on duty from the vessel, on the books of which he continued to be borne while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled.

SEC. 4. *And be it further enacted*, That a bounty shall be paid by the United States for each person on board any ship or vessel-of-war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement, by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force; and of two hundred dollars, if of equal or superior force; to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of their class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel-of-war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.

SEC. 5. *And be it further enacted*, That the commanding officer of every vessel, or the senior officers of all vessels of the navy, which shall capture or seize upon any vessel or vessels as a prize, shall carefully preserve all the papers and writings found on board, and transmit the whole of the originals, unmutilated, to the judge of the district to which such prize is ordered to proceed, with the necessary witnesses, and a report of the circumstances attendin the capture, stating the names of vessels claiming a share thereof; and the com-

manding officer of every vessel in the navy entitled to, or claiming an award of prize money, shall, as early as practicable after the capture, transmit to the navy department a complete list of the officers and men of his vessel, entitled to share, inserting thereon the quality of every person rating, on pain of forfeiting his whole share of the prize money resulting from such capture, and suffering such further punishment as a court-martial shall adjudge.

SEC. 6. *And be it further enacted*, That any armed vessel in the service of the United States which shall make a capture, or assist in a capture, under circumstances which would entitle a vessel of the navy to prize money, shall be entitled to an award of prize money in the same manner as if such vessel belonged to the navy, and such prize money shall be distributed and apportioned in the same manner and under the same rules and regulations as provided for persons in the naval service, and paid under the direction of the secretary of the navy.

SEC. 7. *And be it further enacted*, That no person in the navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or absolutely necessary for the use of any of the vessels or armed forces of the United States, before the same shall be adjudged lawful prize by a competent court; but the whole, without fraud, concealment or embezzlement, shall be brought in, and judgment passed thereon, upon pain that every person offending herein shall forfeit his share of the capture, and suffer such further punishment as a court-martial shall adjudge.

SEC. 8. *And be it further enacted*, That no person in the navy shall strip off the clothes, or pillage, or in any manner maltreat, persons taken on board a prize, on pain of such punishment as a court-martial shall adjudge.

SEC. 9. *And be it further enacted*, That all ransom money, salvage, bounty, or proceeds of forfeiture or confiscation, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto, in the same manner as prize money, under the direction of the secretary of the navy.

SEC. 10. *And be it further enacted*, That any person entitled to wages or prize money may have the same paid to his assignee, provided the assignment be attested by the captain and paymaster; and in case of the assignment of wages, the power shall specify the precise time they commence. But the commander of every vessel is required to discourage his crews from selling any part of their wages or prize money, and never to attest any power of attorney, until he is satisfied that the same is not granted in consideration of money given for the purchase of wages or prize money.

SEC. 11. *And be it further enacted*, That all money accruing or which has already accrued to the United States from sale of prizes shall be and remain forever a fund for the payment of pensions to the officers, seamen, and marines who may be entitled to receive the same; and if the said fund shall be insufficient for the purpose, the public faith is hereby pledged to make up the deficiency; but if it should be more than sufficient, the surplus shall be applied to the making of further provision for the comfort of the disabled officers, seamen, and marines.

No. VIII.

DEPARTMENT CIRCULAR LETTERS OF INSTRUCTION TO NAVAL COMMANDERS.

(CIRCULAR.)

NAVY DEPARTMENT,
May 14, 1862.

Commanding officers of vessels of the navy will, in cases of captures made by them, be held to a strict observance of the requirements of law in relation to captured vessels.

The first section of the "Act for the better government of the navy of the United States," approved April 23, 1800, provides that—

"ART. 7. The commanding officer of every ship or vessel in the navy, who shall capture or seize upon any vessel as a prize, shall carefully preserve all the papers and writings found on board and transmit the whole of the originals, unmutilated, to the judge of the district to which such prize is ordered to proceed, and shall transmit to the navy department complete lists of the officers and men entitled to a share of the capture, inserting therein the quality of every person rating, on pain of forfeiting his whole share of the prize money resulting from such capture, and suffering such further punishment as a court-martial shall adjudge."

"ART. 8. No person in the navy shall take out of a prize, or a vessel seized as a prize, any money, plate, goods, or any part of her rigging, unless it be for the better preservation thereof, or absolutely necessary for the use of any of the vessels of the United States, before the same shall be adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in and judgment passed thereon, upon pain that every person offending herein shall forfeit his share of the capture, and suffer such further punishment as a court-martial, or the court of admiralty in which the prize is adjudged, shall impose."

"ART. 9. No person in the navy shall strip off their clothes, or pillage, or in any manner maltreat persons taken on board a prize, on pain of such punishment as a court-martial shall adjudge."

Whenever it shall be necessary to take any part of the captured property for the use of the United States, a correct inventory shall be made of property so taken, and, also, a careful appraisement of its value, by suitable officers qualified to judge of such value; the inventory and appraisement to be made in duplicate—one part to be transmitted to the navy department, and the other to the judge or United States attorney of the district into which the prize is sent.

If, from unavoidable circumstances, it should become necessary to sell any portion of the captured property, a full report of the facts shall be made to the United States attorney or judge of the district into which the prize is sent, and any proceeds of sale shall be held subject to the order of the district court.

The law requires that the master of the captured vessel shall be sent in, his evidence being considered primary; and as many of the officers and crew of the captured vessel as can properly be taken care of should be sent forward, in custody of the prize master, who will report immediately on his arrival to the United States attorney, as well as to the department.

The prize master will vigilantly guard the captured property intrusted to his care from spoliation and theft, such offences leading to a forfeiture of the prize money, both of the crew and the prize master.

A full report will be made to the navy department of all the material facts attending a capture, and the report will state particularly what public ships or vessels were in sight at the time of capture, and entitled to share in the prize; and the commanders of all vessels entitled to share will transmit complete prize lists to the navy department.

G. V. FOX.
Acting Secretary of the Navy.

(CIRCULAR.)

NAVY DEPARTMENT,
November 6, 1861.

The attention of commanding officers in the navy is called to the following extract in relation to their duties, from the 29th article of the act of April 23, 1800, for the better government of the navy:

"He shall, whenever he orders officers and men to take charge of a prize and proceed to the United States, and whenever officers and men are sent from his ship, for *whatever cause*, take care that each man be furnished with a complete statement of his account, specifying the date of his enlistment and the period and terms of his service, which account shall be signed by the commanding officer and purser."

These requirements must be strictly complied with, and, in addition, duplicate statements

must be forwarded to the paymaster of the vessel or station to which the men are sent, together with a descriptive list of the men sent, according to the form here annexed:

	Enlisted.			*Where Born and Personal Description*								
Names of Crew.	When.	Term.	Rating.	City, Town, or County.	Date.	Age.	Occupation.	Eyes.	Hair.	Complexion.	Height. Feet.	Height. Inches.

FORM OF LETTER OF INSTRUCTION TO PRIZE MASTERS.

U. S. S.———

Off———

——— 186 .

SIR:

Proceed with the ——— under your charge to the port of ——— and there deliver her, together with the accompanying papers (which are all that were found on board) and the persons retained as witnesses, to the judge of the U. S. District Court, or to the U. S. prize commissioners at that place, taking his or their receipt for the same. You will not deliver either her, the papers, or the witnesses, to the order of any other person or parties unless directed to act otherwise by the navy department or flag-officer commanding the squadron.

The ——— was seized by this vessel, under my command, on the ——— day of ——— 186 . off this port, for violating the rules governing the blockade at present instituted by the United States; and of the circumstances attending the case you are sufficiently aware, and will communicate them when required to do so by competent authority.

On your arrival at ———, and immediately after you have visited the judge or prize commissioners, you will call upon the U. S. district attorney thereat, show him these instructions, and give him any information concerning the seizure he may solicit. Then you will next report yourself, in person, to the commanding officer of the navy yard thereat, show him also these instructions, and ask his directions, when needed, as to the disposition of yourself and the rest constituting the prize crew. Finally, when duly notified by the judge, prize commissioners, or district attorney, that your services are no longer wanted by the court, you will at once return to your vessel, taking with you the men under your command and the receipt above alluded to, unless otherwise ordered by superior authority.

You will receive herewith a communication for the secretary of the navy, giving him a detailed account of the prize. This you will mail immediately on your arrival at ———.

Your attention is called to the annexed "Circular," lately issued from the navy department, to which have been added, since it was issued, the words, in the last paragraph, beginning with "together with a descriptive list," &c.; which you will see is complied with, in every particular, before sailing with your prize.

Very respectfully, your obedient servant,

———,

Commanding U. S. S. ———

To ———

No. IX.

PROCLAMATION OF EMANCIPATION.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

I, ABRAHAM LINCOLN, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof, do hereby proclaim and declare, that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and the people thereof in which states that relation is or may be suspended or disturbed; that it is my purpose, upon the next meeting of Congress, to again recommend the adoption of a practical measure tendering pecuniary aid to the free acceptance or rejection of all the slave states so called, the people whereof may not then be in rebellion against the United States, and which states may then have voluntarily adopted, or thereafter may voluntarily adopt, the immediate or gradual abolishment of slavery within their respective limits; and that the efforts to colonize persons of African descent with their consent, upon this continent or elsewhere, with the previously obtained consent of the governments existing there, will be continued.

That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any state or any designated part of a state, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever, free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

That the Executive will, on the first day of January aforesaid, by proclamation, designate the states and parts of states, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any state, or the people thereof, shall on that day be in good faith represented in the Congress of the United States by members chosen thereto at elections, wherein a majority of the qualified voters of such state shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such state and the people thereof have not been in rebellion against the United States.

That attention is hereby called to an act of Congress entitled "An act to make an additional article of war," approved March 13th, 1862, and which act is in the words and figures following:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter the following shall be promulgated as an additional article of war for the government of the army of the United States, and shall be obeyed and observed as such.

"ARTICLE. All officers or persons in the military or naval service of the United States are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor who may have escaped from any person to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court-martial of violating this article shall be dismissed from the service.

"SECTION 2. And be it further enacted, that this act shall take effect from and after its passage."

Also to the ninth and tenth sections of an act entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate property of rebels, and for other purposes," approved July 17th, 1862, and which sections are in the words and figures following:

"SEC. 9. And be it further enacted, that all slaves of persons who shall hereafter be engaged in rebellion against the government of the United States, or who shall, in any way, give aid or comfort thereto, escaping from such persons and taking refuge within the lines of the army; and all slaves captured from such persons or deserted by them and coming under the control of the government of the United States, and all slaves of such persons found in (or being within) any place occupied by rebel forces and afterward occupied by the

forces of the United States, shall be deemed captures of war, and shall be forever free of their servitude and not again held as slaves.

"SEC. 10. And be it further enacted, That no slave escaping into any state territory, or the District of Columbia, from any of the states, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime or some offence against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due, is his lawful owner, and has not been in arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service."

And I do hereby enjoin upon and order all persons engaged in the military and naval service of the United States, to observe, obey, and enforce, within their respective spheres of service, the act and sections above recited.

And the Executive will in due time recommend that all citizens of the United States who shall have remained loyal thereto throughout the rebellion, shall (upon the restoration of the constitutional relation between the United States and their respective states and people, if the relation shall have been suspended or disturbed) be compensated for all losses by acts of the United States, *including the loss of slaves.*

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-seventh.

ABRAHAM LINCOLN.

By the President.

WILLIAM H. SEWARD, *Secretary of State.*

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